IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL.,
Petitioners,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443

SCHWEGMANN BROTHERS, ET AL.,
Petitioners,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENTS.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Calvert R. 102-112, Seagram R. 96-106) is reported in 184 F. 2d 11. The District Court filed no opinion, and entered injunctive decrees with supporting findings and conclusions (Calvert R. 80-91; Seagram R. 77-86).

JURISDICTION

The jurisdiction of this Court rests on 28 U. S. C. 1254 (1), and is not questioned.

STATUTES INVOLVED

The pertinent statutes are the Sherman Anti-Trust Act (Act of July 2, 1890, c. 647, Sec. 1, 26 Stat. 209, 15 U. S. C. Sec. 1) as amended by the Miller-Tydings Amendment (Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. Sec. 1) and the Louisiana Fair Trade Act (La. Act 13 of 1936, La. R. S. 51:391-396). Section 1 of the Sherman Act in its original language and as amended is printed in parallel columns in Appendix A (pp. 79-81). The Louisiana Fair Trade Act is printed in Appendix B (pp. 82-83).

STATEMENT OF THE CASE

Calvert Distillers Corporation brought suit in the United States District Court for the Eastern District of Louisiana against petitioners (defendants below) to enjoin the latter from violating the provisions of the Louisiana Fair Trade Act by selling trade-marked brands of whiskey at prices below those fixed under contracts between Calvert and numerous other retail liquor dealers in Louisiana after the defendants had been notified of the prices so fixed (Calvert R. 2-13). Seagram-Distillers Corporation brought a similar suit against the same defendents (Seagram R. 2-13).

There was judgment in the District Court in each case for the plaintiff against the defendants (Calvert R. 80-91; Seagram R. 77-86). These judgments were affirmed by the Court of Appeals for the Fifth Circuit. A petition for writs of certiorari was granted by this Court on February 26, 1951.

The sole question in the case is whether the so-called non-signer provisions of the Louisiana Fair Trade Act [1] can be denied recognition in transactions affecting interstate commerce on the ground of conflict with the Sherman Act. The lower courts sustained respondents' contention that the Miller-Tydings Amendment exempts from the application of the Sherman Act the non-signer provisions of the State Fair Trade Acts.

The District Court, following the opinion of Judge Borah, in *Pepsodent Co. v. Krauss Co.*, 56 F. Supp. 922 (1944), made detailed findings [2] of the facts necessary to bring respondents' operations within the provisions of the Louisiana Fair Trade Act and the Miller-Tydings Amendment, including particularly a finding of the existence of free, fair and open competition between the products of each respondent and products of the same general class produced by others. The District Court also found that the petitioners had notice of the contracts by which respondents established the resale price of their products. The correctness of these findings is not challenged. The Court of Appeals for the Fifth Circuit affirmed the decision of the District Court.[3]

The provisions of the Louisiana Fair Trade Act are substantially identical with those of similar statutes en-

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[1] The constitutionality of this Act was upheld by the Supreme Court of Louisiana in *Pepsodent Co., and International Cellucotton Products Co. v. Krauss Co.*, 200 La. 959 (1942).

[2] Calvert R. 83-90; Seagram R. 79-85.

[3] In the lower courts the petitioners contended that the contract by which respondents fixed the resale prices of their products were invalid for want of mutuality. This contention was rejected by the lower courts and is no longer in the case.

In the lower courts respondents presented an alternative argument that the Sherman Act could in no event have any application to the retail transactions involved in this case because these were solely intrastate. We recognize that under recent decisions the weight of the argument is against us on this contention and we do not press it here.

acted in forty-five other states.[3a]

Specifically, the non-signer provisions of the Louisiana Fair Trade Act are *identical* with the corresponding provisions of the Fair Trade Act of Illinois which appear *verbatim* in the opinion of this Court in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S., 183 (1936), at page 186. In the cited case this Court upheld these provisions against an attack based on the Fourteenth Amendment.

As the decision in the *Old Dearborn* case did not discuss the possible application of the Sherman Act, in order to put at rest any questions which might arise based upon that Act, Congress in 1937 enacted the Miller-Tydings Amendment to the Sherman Act. It was generally understood that the purpose of Congress in enacting the Miller-Tydings Amendment was to give free rein to the policy of the states in this field and to eliminate any argument based upon supposed conflict with the Sherman Act.

While the Fair Trade Acts have been in operation for over fifteen years, there appear to be only two cases prior to the present cases in which it has been contended that their non-signer provisions are not within the Miller-Tydings Amendment. One of these cases is *Pepsodent Co. v. Krauss Co.*, 56 F. Supp. 922 (1944), cited *supra*, page 3. The other case is *Calamia v. Goldsmith Bros., Inc.*, 299 N.Y. 636, 795 (1949). Both of these decisions deny the contention now made by peti-

[3a] Only Missouri, Texas, Vermont and the District of Columbia have not enacted Fair Trade Acts. A list of the Fair Trade Acts of the various States will be found in 2 CCH Trade Regulation Service, § 7011 ff. The acts have been upheld in every State except Florida, and in that State a new act has recently been introduced in the legislature. For a list of the cases in which the various acts have been passed upon, see 2 CCH Trade Regulation Service, § 7128, listing the decisions of the courts of last resort of eleven States.

tioners. No appeal was taken from Judge Borah's decision in the *Pepsodent* case decided seven years ago and no appeal was taken to this Court from the decision of the Court of Appeals of New York in the *Calamia* case.[3b]

SUMMARY OF ARGUMENT

The Court of Appeals was right in finding, even without resort to legislative history, that the Miller-Tydings Amendment was "free from ambiguity", and that in

> "comprehensively and completely removing from the prohibitions of the Sherman Act *price maintenance contracts which are valid according to the law of a State*,[4] the amendment removed every prohibition from, or impediment in the way of, the enactment by the states of fair trade laws binding alike upon signers and non-signers."

The State Fair Trade Acts represent an exercise of State police power, which will be upheld even in fields which may affect interstate commerce, and will be superseded by federal action only in cases of direct conflict.

In matters of local concern, the reconciliation of the

[3b] There is now pending before this Court a petition (No. 538) for writs to review the decision of the Court of Appeals for the Third Circuit in a case involving the application of the Pennsylvania Fair Trade Act to sales made by a defendant conducting a mail order business and making shipments by mail or express to buyers outside the State. The Court of Appeals for the Third Circuit appears to have recognized the effectiveness of the Miller-Tydings Amendment to validate all transactions under State Fair Trade Acts, including non-signer provisions, when applied to sales made within the State. The case presented to the court was, however, distinguished on the ground that the transactions there involved were not limited to the State but involved shipments outside the State, to which the Court held that the State law could not apply. See *Sunbeam Corporation v. Wentling*, 185 Fed. 2d 903 (C.A. 3, 1950), reversing in part s.c. 91 F. Supp. 81.

[4] Emphasis by the Court of Appeals; Calvert R. 108, Seagram R. 102.

Emphasis generally throughout this brief is supplied by the authors of the brief unless it is otherwise specifically stated.

power of the States with that of Congress is to be attained by the accommodation of the competing demands of the State and national interests involved. The Miller-Tydings Amendment represents such an express accommodation.

The Court will not adopt a construction of a statute which makes the statute futile or which leads to absurd or unreasonable results.

The construction of the Miller-Tydings Amendment for which petitioners contend would make the Amendment futile and ineffective, in violation of the accepted principles of statutory construction. It was conceded by the petitioners in their argument in the lower Court that if the Miller-Tydings Amendment leaves the non-signer provisions of the State Fair Trade Acts unenforceable, those acts would be deprived of any effective operation. The dissenting judge of the Court of Appeals made a substantially similar concession.

The Miller-Tydings Amendment is not to be strictly construed. It is to be interpreted consistently with legislative intent and as an enabling act.

The Court is not concerned with the wisdom or policy of a statute. These are matters for the legislature.

Since its enactment, the Miller-Tydings Amendment has been generally construed as applying to non-signer provisions of State Fair Trade Acts. For that reason its repeal has been from time to time recommended, but Congress has never accepted the recommendation.

The legislative history of a statute should be examined, not only where doubts arise on the face of the statute as to its meaning, but also in cases where a

construction which might appear to be justified by the language of the statute would lead to absurd, futile or unreasonable results.

A detailed examination of the legislative history of the Miller-Tydings Amendment, including Committee reports and debates in Congress, demonstrates the clear intent of Congress to permit all aspects of statutory resale price maintenance to be governed by local law, and, accordingly, to remove the Sherman Act from any application to the consequences under State Fair Trade Acts of transactions within the State.

The Court of Appeals Was Right in Holding, Even Without Resort to Legislative History, That the Miller-Tydings Amendment Removed Every Prohibition From, or Impediment In the Way of, State Fair Trade Acts Binding Alike Upon Signers and Non-Signers.

The conclusion of the Court of Appeals was based upon the language of the Miller-Tydings Amendment, which relieves from the operation of the Sherman Anti-Trust Act contracts providing minimum resale prices where such contracts are lawful as applied to intrastate transactions and satisfy the other provisions of the Amendment.[5]

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[5] These other provisions specify that the contracts exempted are those covering the resale of commodities bearing the trademark, brand, or name of the producer or distributor which is in "free and open competition with commodities of the same general class produced or distributed by others." It is conceded that these conditions are met in the present case.

The Amendment further provides that it shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices "between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other." The cases thus enumerated as not entitled to the protection of the Amendment, commonly referred to as involving "horizontal" price fixing, are not here involved, these being cases of "vertical" price fixing.

Section 1 of the Sherman Act declares illegal only "every *contract, combination* or *conspiracy* * * *." When the Miller-Tydings Amendment removed from the impact of the Sherman Act contracts or agreements valid under State Fair Trade Acts, there was nothing left in the operation of the State Fair Trade Acts to which the Sherman Act could apply. The liability imposed by State law upon non-signers is a liability which the State law imposes as a consequence of the notice given them. Such liability is not within the purview of the Sherman Act. The liability of persons with notice does not depend upon any contract, combination or conspiracy. But the Sherman Act applies only to contracts, combinations or conspiracies.

When the contracts under State Fair Trade Acts were by the Amendment exempted from the operation of the Sherman Act, the State law was free to operate upon the consequences following from those contracts. As the Court of Appeals pointed out, a State needs no mandate from Congress for authority to enact legislation embodied in Fair Trade Acts. On this point the Court of Appeals said:

> "It is admitted, too, that it has been held in *Old Dearborn Distributing Co. v. Seagrams-Distillers Corp.*, 299 U.S. 183, 57 S. Ct. 139, 143, 81 L. Ed. 109, 106 A.L.R. 1476, that state statutes of this character do not violate any provision of the Constitution of the United States, though a fair trade agreement 'constitutes an unlawful restraint of trade at common law and, in respect of interstate commerce, a violation of the Sherman Anti-Trust Act'.
>
> "In this state of the law, proponents of, and protagonists for, the fullest scope for state fair trade statutes needed only the passage of a fed-

> eral act relieving price maintenance contracts from the prohibitions of the Sherman Act. They did not need to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power, indeed in complete derogation of it, to do so. For the power to enact state fair trade laws derives not from the Congress, but from the inherent powers of the states." [6]

The statement of the Court of Appeals is fully supported by the decisions of State courts maintaining the validity of State Fair Trade Acts under the police power of the State. In upholding the Louisiana Fair Trade Act, and especially the non-signer provisions (Section 2), the Louisiana Supreme Court said in *Pepsodent Co. v. Krauss Co.*, 200 La. 959, 979 (1942):

> * * * "Almost all of the courts are of the view, as will be disclosed by a reading of the above-quoted decisions, that an economic question is involved, and the statutes of this nature are a legitimate exercise of the police power."

The police power has been recognized as the source of State authority for the enactment of Fair Trade Acts in decisions of the courts of last resort of California and Illinois [7] upholding the Fair Trade Acts of those States, which were affirmed by this Court, as far as Federal questions were involved, in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936) and *Pep Boys v. Pyroil Sales Co.*, 299 U.S. 198 (1936).[8]

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[6] 184 F. 2d at pp. 14-15; Calvert R. 107, Seagram R. 101.

[7] *Max Factor & Co. v. Kunsman*, 5 Cal. 2d 446 (1936); *Joseph Triner Corp. v. McNeil*, 363 Ill. 559, (1936).

[8] The police power of the State was relied upon in decisions maintaining an early New Jersey statute enacted in 1916 making prices established by makers of identified products binding upon all persons with notice, entirely apart from agreement. See *Ingersoll & Bros. v. Hahne & Co.*, 88 N.J. Eq. 222 (1917); s.c. 89 N.J. Eq, 332 (1918).

See also *Nebbia v. New York*, 291 U.S. 502 (1934), which also illustrates the extent of the police power of the state in its exercise, as here, in the field of price regulation:

> "* * * But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." (page 537)
>
> "* * * Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. * * *" (page 538)

The argument for petitioners ignores the vital and essential interrelation between Sections 1 and 2 of the typical State Fair Trade Act. The two provisions complement each other, and the statutory action for unfair competition under Section 2 against a price-cutting non-contracting retailer assures the contracting retailer that he will be protected against such unfair and destructive competition on the part of non-signers.

The protective character of the action for unfair competition against the non-signer under Section 2, complementing the resale price maintenance contracts authorized by Section 1, was recognized by this Court in the *Old Dearborn* case in the following language:

> "It is first to be observed that §2 reaches not the *mere*[9] advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things *wilfully and knowingly*.[9] We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling

[9] These italics are by the Court.

price, but of a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds wilfully to resell in disregard of it.* * *"

"Appellants here acquired the commodity in question *with full knowledge of the then-existing restriction* in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. *Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under §2 of the law by which such acquisition was conditioned.*" [9]

In the *Old Dearborn* case, this Court outlined in the following language its recognition of the sabotaging effect of price-cutting by a non-signer upon resale price maintenance:

"* * * Appellant sold the products in question at cut prices—that is to say, at prices below those stipulated—and continued to do so after appellee's demand that it cease such practice. The result of such price cutting was a diminution of sales during the price-cutting period suffered by appellee and retailers other than appellant. Some dealers ceased to display the products, and notified appellee that they could not compete with appellant and would discontinue handling the products unless the price cutting was stopped." * * * [10]

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[9] 299 U.S. at pp. 193-194.

[10] 299 U.S. at p. 187. Appellant in the cited case had signed a contract, but questioned the authority of the executing official. This Court assumed the ineffectiveness of the contract and treated appellant as a non-signer.

Even in cases where Congress has not expressly acted (as it did by the enactment of the Miller-Tydings Amendment), it has been held that the Commerce Clause did not deprive the States of the power of legislation with respect to instruments of commerce so far as the legislation was within the ordinary police powers of the State (as the Court of Appeals in this case properly held the Fair Trade Acts to be). Compare *Louisville & Nashville Railway v. Kentucky*, 161 U.S. 677, 702 (1896):

> "* * * It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce so far as the legislation was within its ordinary police powers."

This rule was recognized and applied in *Kelly v. Washington*, 302 U. S. 1 (1937), where the Court said (page 10):

> "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'." (citing numerous cases.)

See also *Allen-Bradley Local v. Board*, 315 U. S. 740, 749 (1942), where the Court said:

> "Furthermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.' *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 611, and cases cited; *Kelly v. Washington*, 302 U. S. 1, 10; *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177; *H. P. Welch Co., v. New Hampshire*, 306 U. S. 79, 85; *Maurer v. Hamilton*, 309 U. S. 598, 614; *Watson v. Buck*, *supra*."

To the same effect are *People of State of California v. Zook*, 336 U. S. 725, 734 (1949); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Company*, 335 U. S. 525 (1949).

In *Prudential Insurance Company v. Benjamin*, 328 U. S. 408, 433 (1946), in upholding a discriminatory State tax, the Court referred to

> "the decisions which, in every instance thus far not later overturned, have sustained coordinated action taken by Congress and the states in the regulation of commerce".

Parker v. Brown, 317 U. S. 341 (1943), does not support the position of the petitioners and the Government. We believe that in substance it supports the respondents. We make no claim that a State may itself give immunity to those who violate the Sherman Act. It is Congress which has given immunity from the Sherman Act to cases arising under State Fair Trade Acts. It is Congress which has indicated its view that the national interest is served by removing any impact of the Sherman Act from transactions under the State Fair Trade laws. In enacting the Miller-Tydings Amendment, Con-

gress evidenced its view that State regulation of the matters covered by the Fair Trade Acts should be sustained. In *Parker v. Brown* the marketing program established by the State was upheld, notwithstanding an impact upon interstate commerce, even in the absence of expressly validating Congressional action comparable to the Miller-Tydings Amendment. The Fair Trade laws of the States evidence a policy of the State as strong as an agricultural program.

In *Parker v. Brown* the Court thus stated the rule applicable in the present cases (p. 362):

> "When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved."

In the present cases Congress has itself expressly provided for the accommodation of the competing demands of the state and national interests involved by enacting the Miller-Tydings Amendment.[10a]

[10a] *Hood & Sons v. Du Mond*, 336 U.S. 525 (1949), a five to four decision, cited by petitioners (p.23) and by the Government (p.9), is very distinguishable from this case because in the situation there presented there was no such evidence of the provision made by Congress for accommodation of the competing demands of the State and national interests as the Miller-Tydings Amendment affords in the present cases.

The Construction of the Miller-Tydings Amendment for Which Petitioners Contend Would Make The Amendment Futile and Ineffective, In Violation of Accepted Principles of Statutory Construction

It is conceded that if the Miller-Tydings Amendment is construed to exclude from its coverage cases arising under the non-signer provisions of the State Fair Acts, those acts become practically meaningless and ineffective.

This is the necessary result of the statement made by opposing counsel in their brief in the Court of Appeals, when they said (page 6):[10b]

> "It should be pointed out that a decision favorable to appellants will cripple, if it will not kill the Miller-Tydings Act. If the Miller-Tydings Act is limited, as the act itself says, to validating fair trade contracts but has no application to price-fixing imposed upon non-contracting parties, fair trade statutes will be deprived of effectivness in transactions affecting interstate commerce. * * *"

Since no Federal legislation was needed for full and unrestrained functioning of State Fair Trade Acts in transactions not affecting interstate commerce, this statement by opposing counsel is a plain admission that the statutory interpretation for which they contend would render the Miller-Tydings Amendment nugatory and futile in the only field in which it was intended to operate, and in which it was or may have been needed. Such an absurd result is contrary to accepted principles established by the decisions of this Court.

[10b] All paging references relating to contentions of opposing counsel denote pages in the brief for petitioners here, except when otherwise specified.

Substantially the same concession was made by the dissenting judge in the Court of Appeals when he said:

> * * * "It is recognized that in this time when the weight of interstate commerce affects multitudinous transactions, the construction here given the Miller-Tydings Amendment greatly circumscribes the relaxation of Federal control in the enforcement of State Fair Trade Acts. However, we should apply the statute as written." * * * [11]

Discussions of the Miller-Tydings Amendment in law review articles, some of which are cited by opposing counsel, confirm the view that the elimination of the non-signer provisions would deprive State Fair Trade Acts of their effectiveness for resale price maintenance. This is shown by the following quotations:

Boonstra, *State Fair Trade Acts and Supplementary Federal Legislation*, 47 Mich. L. Rev. 821, 829 (1949):

> "The success of the Fair Trade Acts is fundamentally dependent upon the 'non-signer' provision".

Callman, *"Fair Trade" and Anti-Trust Law*, 10 Univ. of Pitt. L. Rev. 443, 453 (1949):

> "It has been questioned whether the non-signers clause of the Fair Trade Acts is included in the exemptions of the Miller-Tydings Amendment. True, the phraseology of the amendment does not cover the clause, but a holding that it does not permit legal recourse against non-contracting price-cutters would render the amendment valueless. * * *"

51 Harvard Law Review, 336, 344 (1937):

> "It has been suggested that the Miller-Tydings Amendment further limits the seller and

[11] 184 F. 2d at p. 17; Calvert R. 111; Seagram R. 105.

gives him legal recourse only against a contractually bound price cutter, since it refers only to legalization of the price maintenance contracts themselves, and unlike most state legislation, fails expressly to mention price-cutting by those not parties to the contract."

"Since price maintenance is extremely difficult unless non-contractors with knowledge of the price restrictions are bound, this strict construction of the act would greatly impair its usefulness."

16 New York Univ. L. Quar. Rev. 113, 116-117 (1938):

"However, the Federal Act, modelled after the State Acts up to this point, lacks a corresponding provision binding non-contracting dealers by means of notice of price restrictions. This omission has raised a problem as to the legal status of non-contracting dealers engaged in interstate commerce. * * * Thus, if this constitutional objection is sustained and the provision of the state Fair Trade Acts binding non-contracting dealers is restricted to intrastate business, the combined State and Federal legislation will, in the bulk of transactions, afford but scanty protection to the owner of the goodwill. * * * In the light of these considerations, it is apparent that little, if anything, would remain of the whole protective structure of resale price maintenance legislation." [11a]

It being thus recognized that the construction for which the petitioners contend would make the Miller-Tydings Amendment a futile and really absurd enactment, the case is brought within the well settled rule,

[11a] After reviewing legislative history the author concludes that the Miller-Tydings Amendment clearly covers the non-signer provisions of the State Fair Trade Acts, saying "there is no real basis for * * * limiting the sphere of the applicability of * * * the Federal Act". For a fuller quotation, see *infra*, pp. 73-74.

that the Court will not adopt a construction of a statute which would make the statute ineffective or useless or meaningless.

In *Bird v. United States*, 187 U.S. 118, 124 (1902), a case frequently cited and followed on this point, this Court said:

> "* * * There is a presumption against a construction which would render a statute *ineffective or inefficient* or which would cause grave public injury or even inconvenience."

More recent expressions of this view by this Court are as follows:

Armstrong v. Nu-Enamel Corp., 305 U.S. 315, 332-333 (1938):

> "This Court has had several occasions within the last few years to construe statutes in which conflicts between reasonable intention and literal meaning occurred. We have refused to nullify statutes, however hard or unexpected the particular effect, where unambiguous language called for a logical and sensible result. Any other course would be properly condemned as judicial legislation. However, to construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where, as here, the language is *susceptible of a construction which preserves the usefulness of the section*, the judicial duty rests upon this Court to give expression to the intendment of the law".

United States v. Powers, 307 U.S. 214, 217 (1939):

> * * * "The statute should not be so construed if another interpretation will make it *effective*."
> * * *

Sunshine Coal Co. v. Adkins, 310 U.S. 381, 392 (1940):

> • • • "That construction would read the 19½% tax out of the Act. The essential sanction of the Act would then disappear and its effectiveness would be seriously impaired. That alternative will not be taken where a *construction* is *possible* which will *preserve* the *vitality* of the Act and the *utility* of the language in question." • • •

Gemsco, Inc. v. Walling, 324 U.S. 244, 258 (1945):

> • • • "What is 'incidental,' what 'independent' of stated statutory ends often presents a difficult issue. But that is seldom if ever true when *to deny* the authority or other feature questioned *would nullify the Act*, by reading out of its purview the only means for making it effective."

Miller-Tydings Amendment Is Not to Be Strictly Construed.

Opposing counsel seek to narrow the scope of the Miller-Tydings Amendment by invoking the doctrine of strict construction. The Solicitor General, in his memorandum supporting the certiorari application (pp. 6-7), also involves this doctrine of strict construction. He cites two decisions against restriction or limitation of the Sherman Act by *implication* from subsequent Federal legislation. Neither of these decisions is at all apposite here. Both were cases in which the implication was sought to be drawn from subsequent independent legislation not in terms expressly purporting to amend the Sherman Act.[12]

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[12] In *United States v. Borden Co.*, 308 U.S. 188, 198-199, 203-206 (1939), it was argued unsuccessfully that the Agricultural Market Agreement Act of 1937 and the Capper-Volstead Act had impliedly repealed or restricted certain provisions of the Sherman Act. In *U. S. Alkali Export Association v. United States*, 325 U.S. 196, 206-211 (1945), it was unsuccessfully argued that the Webb-Pomerene Act had that effect.

Counsel for petitioners (pp. 26-27) argue for a strict construction of the Miller-Tydings Amendment upon the authority of a quotation from Sutherland, *Statutory Construction* (3rd Ed. 1943), concerning the scope to be accorded to a "proviso" in a statute. However, a more extended quotation of the section quoted in part by our opponents shows the author to be in accord with the views which we express. This is indicated by the following further language of Mr. Sutherland in the cited section (4933):

> "As in all other cases, a proviso should be interpreted consistently with legislative intent. Where the proviso itself must be considered in an attempt to determine the intent of the legislature, it should be strictly construed. This is true because the legislative purpose set forth in the general enactment expresses the legislative policy and only those subjects expressly exempted should be freed from the operation of the statute. As the result of improper drafting, the 'provided, however' clause has been used to introduce new and unrelated material, and thus courts have held on some occasions that the words will be treated merely as introductory of new material."

As will be observed, legislative intent—the factor we stress—is given primary mention by the author. To the same effect is the comment of that same author at Section 4936 of his work:

> "The older rule strictly interpreted both exceptions and provisos but today exceptions and to some extent provisos are interpreted principally *in view of the legislative intent* and no presumption arises because of the form of the act that the interpretation must be strict."

Even where a "proviso" clause is to be interpreted,

the decisions of this Court do not attribute to the "proviso" the uniform requirement of strict construction for which opposing counsel contend. See *Springer v. Philippine Islands*, 277 U.S. 189, 207 (1928):

> * * * "It is difficult to assign to either proviso the general purpose of that form of legislation, which is merely to qualify the operation of the general language which preceeds it. We think rather that both provisos are to be construed as independent and substantive provisions. As this Court has more than once pointed out, it is not an uncommon practice in legislative proceedings to include independent pieces of legislation under the head of provisos. See *Georgia Banking Co. v. Smith*, 128 U.S. 174, 181; *White v. United States*, 191 U.S. 545, 551; *Cox v. Hart*, 260 U.S. 427, 435."

McDonald v. United States, 279 U.S. 12, 21 (1929):

> * * * "Little if any significance is to be given to the use of the word 'provided'. In Acts of Congress, that word is employed for many purposes. *Schlemmer v. Buffalo, Rochester, &c. Ry.*, 205 U.S. 1, 10." * * *

The Miller-Tydings Amendment is not subject to any rule of strict construction, but it should be recognized and given effect, in accordance with legislative intent, as being what one of its supporters denominated it in the debate on final passage in the House of Representatives—"a fair-trade enabling act." [13]

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[13] 81 Cong. Rec. p. 8140. See *infra*, p. 66.

United States v. Univis Lens Co., 316 U.S. 241 (1942); *United States v. Masonite Corporation*, 316 U.S. 265 (1942); *United States v. Bausch & Lomb Co.*, 321 U.S. 707 (1944); and *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945), cited in opposing briefs, have no bearing on the present cases. They do not support a contention that the Miller-Tydings Amendment is to be construed nar-

(continued)

The Court Is Not Concerned With the Wisdom or Policy of a Statute. These Are Matters for the Legislature.

The argument presented in the brief of opposing counsel (pp. 11-12, 28-36) is to a large extent an attack on the economic desirability of the statutes involved. Such an argument goes to questions of legislative policy.[14] While opposing counsel are careful (p. 29) to disclaim any request to this Court to pass on the wisdom of the law, much of the material which they present is pertinent only to a legislative hearing on a repeal or amendment proposal.

The opinions of various writers as to the merits or demerits of the working of "Fair Trade" since 1937

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[13] continued:
rowly. The transactions involved in the cited cases were clearly outside the protection of the Miller-Tydings Amendment.

The *Masonite* and *Frankfort Distilleries* cases involved horizontal price fixing, expressly excluded by the Miller-Tydings Amendment from its protection.

The *Univis* case was a further processing case, not within the intent or language of the Miller-Tydings Amendment.

The *Bausch & Lomb* case denied the protection of the Miller-Tydings Amendment to certain contracts only because they "came into existence as a patch upon an illegal system of distribution", which had been established prior to the Amendment *(321 U.S. at p. 724)*.

In none of the cited cases did this Court enunciate or support any rule that the Miller-Tydings Amendment should be construed narrowly.

[14] There is much opinion entitled to great respect in favor of the social and economic principles, upon which the Fair Trade Acts proceed. See Brandeis, *"Cut Throat Prices—the Competition that Kills"*, Harper's Weekly, November 15, 1935. The views of Justice Brandeis are summarized in 57 Yale Law Journal 472, note 54, as follows:

> "Strong support was given to resale price maintenance by Brandeis who felt that preservation of the small retailer outweighed the advantages to be derived from the efficient monopolist. He was convinced that resale price maintenance would stamp out the price-cutting which led inevitably to monopoly and higher prices. One of his basic postulates, however, was that competition among manufacturers would result in a competitive fair price. Brandeis, *Business—A Profession* 243 (1914)."

See also the statement made by Governor Herbert H. Lehman in approving the New York Fair Trade Act, reported in New York Times of May 18, 1935.

can throw no light on the intent or purpose of Congress in enacting the Miller-Tydings Amendment in 1937. Certainly, under the "plain meaning" rule, which opposing counsel champion vigorously, the statutory language, or the meaning of that language, cannot be changed by views of various individuals concerning the merits of the statute, especially where such views are based upon events subsequent to enactment.

Of course, the groups most vitally interested in the maintenance of Fair Trade Laws, and doubtless largely responsible for the enactment of the Miller-Tydings Amendment, are the thousands of small merchants throughout the country who are engaged in an effort to maintain their existence against the competition of large organizations which can engage in price cutting. Whether it is more to the national interest to support these small merchants and retain them as a class in our business life or to permit consumers to get the benefit of cut prices, is a matter for Congress and the State legislatures, not for this Court.

We are confident that the Court will lay aside, as irrelevant on the issues of statutory meaning or interpretation, the arguments assailing these statutes on their merits. Compare the observations of Justice Harlan in *Northern Securities Co. v. United States*, 193 U.S. 197, 351-352 (1904):

> "Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences. Disaster to business and widespread financial ruin, it has been intimated, will follow the execution of its provisions. * * *
>
> "But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legis-

lative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the Court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restrain of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy * * *."

Also pertinent here is what was said on this subject in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 195 (1936):

> "There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the cir-

cumstances here disclosed, is conclusive so far as this court is concerned."

Since its Enactment the Miller-Tydings Amendment Has Been Generally Construed as Applying to Non-Signer Provisions of State Fair Trade Acts.

We have heretofore referred to the circumstance that in the many years which elapsed from the date of the enactment of the Miller-Tydings Amendment in 1937 up to the filing of the cases now under review, only two cases have been presented to the courts in which it has been even contended (unsuccessfully) that the Miller-Tydings Amendment did not validate the non-signer provisions appearing in all State Fair Trade Acts.[15] During this considerable period of time there have been extensive operations under the State Fair Trade Acts which have affected the activities of large segments of the business community. During this period there has been substantial criticism of the policy which forty-five legislatures have seen fit to approve. Some of this criticism has included recommendations for the repeal of the Miller-Tydings Amendment. At least two former Assistant Attorneys General of the United States have made such a recommendation in behalf of the Department of Justice.[16]

Assistant Attorney General Thurman Arnold in expressing the view of the Department of Justice that the Miller-Tydings Amendment should be repealed, said in 1941:

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[15] See *supra*, pages 4-5.

[16] Address of Assistant Attorney General Bergson before the Association of the Bar of the City of New York, February 17, 1949, 4 Record of The Association of the Bar of the City of New York 115; Statement of Assistant Attorney General Thurman Arnold in a communication to the Temporary National Economic Commission, reported at pp. 18162-5, T.N.E.C. Hearings.

> "The power given by law *to coerce non-signers* to abide by the terms of resale price contracts, destroys competition among retailers as effectively as would an unlawful conspiracy." [17]

In a statement to the House of Representatives Committee on the Judiciary, Subcommittee on the Growth of Monopoly, Mr. John D. Clark, a member of the Council of Economic Advisers, evidenced his understanding that the Miller-Tydings Amendment had legalized action against non-signers under State statutes authorizing such action, saying:

> "The Miller-Tydings Act has amended the Sherman Act to permit business conduct, under the sanction of state laws, which unquestionably violates the principle of the original statute. Nearly every state has now enacted a statute to authorize manufacturers to fix a retail price which must not only be observed by retailers who contract to do so, but which, under some of the statutes, *must be observed by all retailers including those who have not been obliged to make such contracts.*" [20]

Mr. Clark suggested to the House Subcommittee that if its inquiry showed that results obtaining under trade practices were undesirable, the existing legislation should be revised. But it never has been.

The Temporary National Economic Committee in 1941 recommended that the Miller-Tydings Amendment be repealed.[20a]

Obviously there would be no occasion to recommend the repeal of the Miller-Tydings Amendment if it did not make enforceable the non-signer provisions of the

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[17] See T.N.E.C. hearings, pages 18162-5.

[20] See hearings of Subcommittee of Committee of Judiciary on the Study of Monopoly, House of Representatives, 81st Congress, First Session, Serial No. 14, Part 1, page 113.

[20a] T.N.E.C., *Investigation of Concentration of Economic Power, Final Report and Recommendations* 121 (1941).

State Fair Trade Acts, since if the Miller-Tydings Amendment did not have that effect, the purpose of the State Fair Trade Acts could not be accomplished and resale prices could not be maintained.

The Federal Trade Commission, which is the official public body entrusted with the supervision of trade practices, has consistently indicated its view that the non-signer provisions of the State Fair Trade Acts were by virtue of the Miller-Tydings Amendment enforceable in transactions affecting interstate commerce. In our review of legislative history, we have quoted from the letter of the Chairman of the Federal Trade Commission, which was transmitted by the President of the United States to Congress at the time that Congress had the Amendment under consideration, in which the Chairman expressly stated his understanding that the Amendment would make the non-signer provisions of the Fair Trade Acts "binding upon interstate commerce." [21]

Opposing counsel suggest (p. 82) that a quoted utterance of the Chairman of the Federal Trade Commission in October, 1937, shows an abandonment of his expressed view that the Miller-Tydings Amendment would make the non-signer provisions of State Acts effective in interstate commerce. What the Chairman then said could hardly be evidence of the purpose of legislation enacted two months previously. We dispute the meaning attributed by opposing counsel to the language which they quote but, be that as it may, the following other language used by the Chairman on that occasion, and quoted from the same source, completely destroys the theory advanced by opposing counsel:

> "Enactment of the Tydings-Miller bill was, of course, the culmination of a drive during which

[21] See the discussion, *infra*, pages 44-61, pointing out that Congress elected to enact the Miller-Tydings Amendment in the face of this admonition from the Chairman of the Federal Trade Commission.

> 42 State legislatures enacted price maintenance acts. In brief, the Federal Act does nothing more than *make lawful in interstate commerce* among 42 states *the practices which those states* already had made lawful in their intrastate commerce." [22]

At the time the Chairman of the Federal Trade Commission made the statement above quoted, there were pending before the Commission various proceedings against manufacturers of alcoholic liquors by which it was sought to have them desist from engaging in an alleged practice of imposing resale price maintenance upon all persons handling their products. Subsequently to the passage of the Miller-Tydings Amendment, the respondents in the proceedings before the Commission directed its attention to the enactment and thereupon the Commission entered orders reciting that in view of the Amendment it was closing the cases,[23] except as to what was done in the District of Columbia where there was no local Fair Trade Act. All of these orders were entered in 1938. It is obvious that the Federal Trade Commission would not have closed the cases as it did unless it had been of the view that the Miller-Tydings Amendment had authorized the enforcement of non-signer provisions under State Fair Trade Acts.[23a]

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[22] The Chairman's address as reported in 2 CCH Trade Regulation Service, § 7091.

[23] *Seagram-Distillers Corporation and Seagram-Distillers Corporation of Massachusetts*, 27 F.T.C. 106, 119-120 (1938); *Gooderham & Worts, Ltd., et al.*, 27 F.T.C. 123, 141-142 (1938); *Schenley Distillers Corp., et al.*, 27 F.T.C. 145, 159-160 (1938); *Hiram Walker, Inc., et al.*, 27 F.T.C. 162, 181-182 (1938); *National Distillers Products Corporation*, 27 F.T.C. 186, 208 (1938).

[23a] The Commission's action recognized the purpose and effect of the Miller-Tydings Amendment which are brought out in a monograph by Professor Edward H. Gault on Fair Trade in Michigan, 9 Michigan Business Studies, 1, 3:

> "Federal laws, in general, do not permit the owner of a trade-mark to control the resale price of his trade-marked merchandise. In order to avoid the danger of Federal illegality in the use of the state Fair Trade laws in interstate commerce, the Miller-Tydings Act was passed by Congress. The purpose of the act was to prevent Federal intervention in the use of the Fair Trade laws and avoid the dangers of interference by the Federal Trade Commission."

Further evidence of the construction placed upon the Act by the Federal Trade commission is to be found by its findings in *Eastman Kodak Co.*, 39 F.T.C. 154 (1944). In that case the Commission recognized the right to enforce non-signer provisions where the conditions of the Miller-Tydings Amendment were met.

The weight to be attached to the construction of the Miller-Tydings Amendment by the Federal Trade Commission and representatives of the Department of Justice is indicated by the language of this Court in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 246 (1951), where this Court said:

> "In addition, there has been widespread understanding that, under the Robinson-Patman Act, it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor. This understanding is reflected in actions and statements of members and counsel of the Federal Trade Commission. Representatives of the Department of Justice have testified to the effectiveness and value of the defense under the Robinson-Patman Act. We see no reason to depart now from that interpretation."

In the light of the general understanding that the Miller-Tydings Amendment legalizes the State Fair Trade Acts and so makes possible effective retail price maintenance, the criticism of that practice by many writers (some of whom are quoted in the petitioners' brief [24]), and the recommendations which have been made

[24] For example, the articles published in Fortune in January and April, 1949, cited by petitioners in the footnote at page 15 of their brief, containing criticisms of the Fair Trade Acts, clearly indicate the understanding of the author and editor that the Miller-Tydings Act legalizes price maintenance as to non-signers; otherwise there would have been no occasion for the criticisms expressed in the article, since the alleged evils complained of would not exist.

for its repeal, one would expect that if the criticisms were well taken, Congress would have repealed the Miller-Tydings Amendment. *But Congress has never shown any sympathy for suggestions of repeal.* Various bills have been introduced to repeal the Amendment, but all of them have died in Committee, e.g., S. 204, 76th Congress, by Senator King; H. R. 3821, by Representative Fulmer, 77th Congress; H. R. 4003, 81st Congress, by Representative O'Toole.

The Court Should Examine the Legislative History of the Miller-Tydings Amendment.

Petitioners contend that the Miller-Tydings Amendment is clear and unambiguous, so that there should be no resort to legislative history. Nevertheless, petitioners undertake to review the legislative history in an effort to find in it support of their contention as to the meaning of the statute.

The cases generally state the rule to be that where a statute is plain and unambiguous and on its face evidences a meaning which, to use language employed by this Court, *does not lead to absurd or futile or unreasonable results*, no occasion arises to examine legislative history.[26] The present cases illustrate the difficulties

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[26] The law review articles and other authorities cited in petitioners' brief (pp. 38, 40) will upon a full reading, we believe, be found to indicate a view that legislative history may, and should be, resorted to in all cases of statutory construction; see *Jones, The Plain Meaning Rule and Extrinsic Aids in Interpretation of Federal Statutes*, 25 Wash. U. L. Q. at pages 11, 23-26 (1939); Horack, *Disintegration of Statutory Construction*, 24 Ind. L. Journal at page 341.

Sutherland, *Statutory Construction* (3d Ed. 1943) Section 4502:

> * * * Courts should not lose sight of the fact that statutory interpretation, whatever it may be called so far as the function of courts and juries is concerned, is a fact issue. Where available, the courts should never exclude relevant evidence on that issue of fact."

Compare Landis, *"A Note on 'Statutory Interpretation'"*, 43 Harvard Law Review, 886 at 892, (1930):

> "To ignore legislative processes and legislative history in the processes of interpretation is to turn one's back on whatever history may reveal as to the direction of the political and economic forces of our times."

which may arise in the application of the rule when the parties are in sharp disagreement as to the meaning of a statute. Sometimes only one of the parties contends that the statute is plain and the other contends that it is not. In the present cases we have the unusual situation where both parties contend that the statute is plain, but the meaning which each attributes to the statute is entirely opposed to the meaning attributed thereto by the other. In the present cases we have the added circumstance that the three Judges of the Court of Appeals who heard the cases below, while also agreeing that the statute was plain on its face, could not agree as to what its plain meaning was. Two of the Judges thought the plain meaning was that for which we contend; a dissenting Judge thought the plain meaning was entirely the opposite.

While we believe that the intent of the statute appears with sufficient plainness on its face in the sense which we attach to it, the circumstances above referred to make it impossible for us to feel that we would discharge our professional obligation if we did not fully develop the legislative history of the statute.[27] This Court has made constant use of legislative history material in recent years as a controlling basis in determining the meaning and effect of statutes. Such use has not been limited to cases in which the right to resort to such material was controverted. In many cases legislative history has been resorted to without any

[27] In *Pepsodent Co. v. Krauss Co., Ltd.*, 56 F. Supp. 922 (1944), which involves the same point as the instant cases, Judge Borah, then sitting in the District Court, resorted to the legislative history of the Miller-Tydings Amendment Act, and in his opinion fully reviewed that history. He concluded, as did the District Judge and the majority of the Court of Appeals in the instant cases, that the Amendment removed from the operation of the Sherman Act cases arising under the non-signer clause of the Fair Trade Acts. No appeal was taken from this decision.

discussion in the opinions as to the necessity for or propriety of such resort.[28]

The extensive use of legislative history by this Court in the interpretation of statutes is illustrated by Appendix A to the dissenting opinion of Mr. Justice Frankfurter in *Commissioner v. Estate of Church*, 335 U. S. 632 (1949). That appendix lists one hundred and thirty-three decisions of this Court, all rendered within the single preceding decade, in which legislative history was decisive of the construction of a statute. The recent opinions of the Court attest the continuance of this practice. We deem it sufficient to refer only to a few of the decisions of this Court which are especially applicable to the circumstances of the present case and the relevance of which we emphasize by a brief reference to our arguments and those of opposing counsel.

We have already adverted to the circumstance that while a majority of the Judges in the Court of Appeals considered the statute to have the plain meaning for which we contend, a dissenting Judge thought its plain meaning was the contrary. In this situation, even if the rule permitting resort to legislative

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[28] The practice of this Court is recognized in an article cited (page 38) by opposing counsel, Horack, *Disintegration of Statutory Construction*, 24 Ind. L. Jour., 335, 341 (1949), where the author says:

> "The use of extrinsic materials in the interpretation of statutes by the Supreme Court of the United States has been a standard practice. Fortunately it has seldom felt the necessity of defending their use by the repetition of formalistic rules of interpretation. Its opinions show that the meaning of the statute cannot come from the statutory words alone."

See Frankfurter, *Reading of Statutes*, 47 Columbia Law Review 527, 542-3 (1947);

> "When Mr. Justice Holmes came to the Court, the U. S. Reports were practically barren of references to legislative materials. These swarm in current volumes. And let me say in passing that the importance that such materials play in Supreme Court litigation carry far-reaching implications for bench and bar."

Cf. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 Am. Bar. Assn. Journal 535 (1948).

history were to be confined to cases where the statute was not plain and unambiguous, the Court may well resort to legislative history in reaching its decision. But the decisions show that resort to legislative history may be had even where the statute may be considered plain and unambiguous, if on its face it evidences a meaning leading to absurd, futile or unreasonable results. In the present case, as we have noted, opposing counsel themselves concede that a decision in their favor would make the Miller-Tydings Amendment entirely futile, and a similar concession was made by the dissenting Judge in the Court of Appeal.[29]. These concessions bring this case within the rule laid down by this Court in *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940), where the Court said:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or futile*[30] *results, however, this Court has looked beyond the words to the purpose of the act. Frequently however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.* When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination' ".

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[29] See *supra*, pages 15-16.

[30] For decisions of this Court that a statute will be so interpreted as to avoid an absurd or futile result, see *supra*, pp. 18-19.

In another decision handed down on the same day, this Court refused to apply the "plain meaning" rule and, predicating its decision on legislative history, said, *United States v. Dickerson*, 310 U. S. 554, 562 (1940):

> "The very legislative materials which respondent would exclude refute his assumption. *It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words.* Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. See *Boston Sand & Gravel Co. v. United States*, *supra*, at p. 48. The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction."

In a later case, *Harrison v. Northern Trust Co.*, 317 U. S. 476, 479 (1943), this Court said:

> "But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination" '. *United States v. American Trucking Assns.*, 310 U. S. 534, 543-44. See also *United States v. Dickerson*, 310 U. S. 554, 562."

In the light of the quoted language, it is difficult to support a contention that the legislative history of the Miller-Tydings Amendment should not be examined, even if it could be said that its plain language on its face led to the result for which the petitioners contend.

Petitioners argue that significance is to be attached to the failure of the Miller-Tydings Amendment to expressly refer to the non-signer provisions of the Fair Trade Acts. This Court has specifically held that in weighing contentions of this character, legislative history will afford a guide. Thus, in *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943), the Court resorted to legislative history in determining whether there was a right to judicial review of a decision of the National Mediation Board. That Board was created by the Railway Labor Act, which nowhere mentions judicial review of the Board's decisions. In considering the legislative history, the Court said (p. 301):

> "Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied."

We contend, and our opponents deny, that the general purpose of the Miller-Tydings Amendment was to turn over to the respective States the entire subject of vertical resale price maintenance (as applying to identified commodities selling in free and open competition), and to liberate all provisions of local statutes on that subject from any possible claim that these statutes ran afoul of interstate commerce regulations.[31] In weighing the opposing arguments the Court will find evidence of the intention of Congress in the congressional debates. In so doing, the Court will follow the rule which it stated in *United States v. San Francisco*, 310 U.S. 16 (1940), footnote 10, page 22:

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[31] See *infra*, pages 75-78.

> "Reference to congressional debates may be made to establish a common agreement upon the general purpose of an Act. *Standard Oil Co. v. United States*, 221 U.S. 1, 50; *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 650; *Humphrey's Executor v. United States*, 295 U.S. 602, 625."

The reports and debates on the Miller-Tydings Amendment make frequent references[32] to the then recent decision of this Court in the *Old Dearborn* case, 299 U.S. 183, in which this Court specifically upheld the non-signer provisions of State Fair Trade Acts. These references to this decision in the processes of the enactment of the Miller-Tydings Amendment are significant in resolving the problem of statutory interpretation; see *Overstreet v. North Shore Corp.*, 318 U.S. 125, 131-132 (1943):

> "* * * We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the Pedersen and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, *especially when Congress* in adopting the phrase 'engaged in commerce' *had those Federal Employers' Liability Act cases brought to its attention.*"

This language is also directly applicable to the circumstance that, in the consideration of the Miller-Tydings Amendment, the attention of Congress was particularly directed to a communication from the President of the United States, enclosing a letter from the Chairman of the Federal Trade Commission, in which the latter indicated his view that the Miller-Tydings Amendment would make the non-signer provisions of State Fair Trade Acts binding in cases arising in interstate com-

[32] See *infra*, pages 39, 42, 45, 48, 50, 55, 56, 60-61.

merce cases.[33]

The decisions of this Court chiefly relied upon by opposing counsel[34] as a bar to any consideration of legislative history here, are insufficient to overcome the weight and effect of the decisions to which we have referred. None of the cases cited by opposing counsel presented a situation comparable to this case. In none of them did two judges find language to mean one thing, while a third judge found it to mean the reverse. In none of them did the interpretation adopted lead to "absurd or futile" or "unreasonable" results or results "plainly at variance with the policy of the legislation as a whole."[35]

We proceed now to a detailed review of the legislative history of the Miller-Tydings Amendment.

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[33] This letter was frequently incorporated in the legislative record: 81 Cong. Rec. p. 7490; S. Doc. No. 58, pp. 2-3, 75th Cong., 1st Sess.; S. Rep. No. 879, Part 2, pages 3-4; see *infra*, pages 44, 47, 48, 49.

[34] In *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945), this Court actually considered legislative history and found it did not sustain the argument predicated upon it, saying (p. 260):

> "* * * The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." * * *

In *Ex Parte Collett*, 337 U.S. 55 (1949), this Court considered legislative history to the extent of a ten-page analysis (pp. 61-71) and arrived therefrom at the same conclusion as derived from the statutory language itself.

In *Packard Motor Car Co. v. N. L. R. B.*, 330 U.S. 485 (1947), four out of nine Justices dissented on the ground, *inter alia*, that legislative history should have been considered and would have aided in producing a different outcome.

In *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932), a substantial minority of the Court specially concurred (p. 85) in the result on the ground that it was supported by the legislative history which the majority had declined to consider.

Caminetti v. United States, 242 U.S. 470 (1916), was cited in the opinion of this Court in *United States v. American Trucking Assn.*, *supra* (310 U.S. 534, 543), and evidently considered by the Court to be entirely consistent with the rule there laid down, that a statute will not be construed so as to lead to absurd, futile or unreasonable results, even though the language of the statute on its face might appear plain.

[35] See quotation from *United States v. American Trucking Assn.*, *supra*, p. 33.

The Legislative History of the Miller-Tydings Amendment Demonstrates the Clear Intent of Congress to Permit All Aspects of Statutory Resale Price Maintenance to Be Governed By Local Law.

Since the Court below, deciding in our favor on other grounds, declined to consider this point, legislative history is not discussed or appraised in the opinion under review.

The only reported decision dealing with this particular legislative history problem is *Pepsodent Co. v. Krauss Co.*, 56 F. Supp. 922 (D.C. La., 1944). The issue raised there was identical with the issue here involved. Judge Borah, after reviewing the legislative history of the Miller-Tydings Amendment in some detail, ruled in favor of the contention which we make here and succinctly stated his reasons for this conclusion as follows (p. 927):

> "The history of the legislation leaves *no doubt* that Congress enacted the Miller-Tydings amendment with *full knowledge* of the *provisions* in state fair trade acts making resale price maintenance effective *against non-contracting retailers*, and that it was the *design and intention of Congress to remove every obstacle* which would hinder the free enforcement *by the states* of the provisions of their local fair trade acts in such fashion as their respective legislatures saw fit."

We now present a review in full detail of the legislative history to the end of demonstrating the clear correctness of Judge Borah's conclusion. We emphasize in this review what Judge Borah emphasized—(1) *Congressional knowledge* of state statutory provisions making resale price maintenance *effective against non-signers*

and (2) *Congressional intent to give full scope to local statutes* in the field of resale price maintenance.

Introduction of H. R. 1611 and S. 100.

The final chapter in the legislative history of the Miller-Tydings Amendment commences with the introduction of bills of substantially identical text (H. R. 1611 [36] and S. 100 [37]) early in the First Session of the 75th Congress. The fruition of the introduction of these bills [38] was the *enactment of the Miller-Tydings Amendment* as Title VIII of H. R. 7472 several months later in that same session.

These bills were introduced just about *one month after this Court*, on December 7, 1936, had *upheld the constitutionality of the Illinois and California Fair Trade Acts.*[39] These State acts provided that contracts fixing a minimum price on identified commodities should be *enforcible*, as a matter of State law (based upon State views of unfair competition) *against non-contracting resellers on notice* thereof. As will be demonstrated hereinafter, the progress of the legislative proposals in Congress to enactment was accompanied by a number of references to these *"non-signer"* provisions in State Fair Trade Acts and to the decisions of this Court upholding the validity of such statutes, including these particular provisions.

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[36] Introduced by Representative Miller January 5, 1937; 81 Cong. Rec. p. 34.

[37] Introduced by Senator Tydings January 6, 1937; 81 Cong. Rec. p. 66.

[38] Petitioners find significance in unenacted legislative proposals on this subject in prior sessions of Congress. We differ with petitioners as to the weight to be accorded to the course of these earlier legislative proposals, which we discuss hereinafter; see *supra*, pp. 62, 64, 75-78.

[39] *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183 (1936); *Pep Boys v. Pyroil Sales Co.*, 299 U. S. 198 (1936).

Senate Committee Report on S. 100.

This bill, upon introduction, was referred to the Senate Judiciary Committee.[40] On March 29, 1937, it was reported favorably with amendments which do not throw any light on the present problem.[41] The Committee report quotes the report made at the previous session on S. 3822.[42] While that report did not specifically mention the non-signer provisions in the State Fair Trade Acts or the then recent decision of this Court upholding their constitutionality, those subjects were placed before the Senate fully at other stages of this legislative proposal.[43]

The report on S. 3822 did contain the following recitals of an intent to give full scope to State legislation in each locality:

> "The Congress is not called upon to pass upon the effectiveness of the remedy, but *it should not put obstacles in the way of efforts of the individual States to make the remedy effective.*" * * *
>
> "But most important, from the standpoint of

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[40] 81 Cong. Rec. p. 66.

[41] 81 Cong. Rec. p. 2802; S. Rep. No. 257, 75th Congress, 1st Session.

[42] S. 3822 was introduced in the 74th Congress, 2nd Session, by Senator Tydings. While differing somewhat in wording from H. R. 1611 and S. 100, it was intended to accomplish the same substantial result; see *infra*, page 62. It was passed by the Senate without amendment and referred to the House Judiciary Committee, but Congress adjourned before further action was taken. See 80 Cong. Rec. p. 8433.

The Senate report on S. 3822 will be found in S. Rep. No. 2053, 74th Cong., 2nd Sess. This report is also again quoted in the Senate Committee report on Title VIII, H. R. 7472, 75th Congress, 1st Session, which embodied the Miller-Tydings Amendment as finally enacted; see S. Rep. No. 879, Part 1, 75th Cong., 1st Sess., *infra*, pages 47-48.

[43] This frequently used Committee report significantly mentions "loss-leader" selling as the practice against which the proposed legislation was directed. We point out elsewhere (*infra*, p. 63, footnote 100) the significance of this concept of the legislative aim as indicating an intent that this Federal enabling legislation should extend to making operative the non-signer provisions of the State laws.

Congress, the proposed bill merely *permits the individual states to function, without Federal restraint*, within their proper sphere, and does not commit the Congress to a national policy on the subject matter of the state laws.

"In other words, the bill does no more than to remove Federal obstacles to the enforcement of contracts which the States themselves have declared lawful."

House Committee Report on H. R. 1611

This bill, upon introduction, was referred to the House Judiciary Committee.[44] On March 11, 1937,[45] it was reported favorably with amendments not important in the present controversy. The Committee report on this bill[46] *demonstrates both Congressional knowledge of the non-signer provisions* in State Fair Trade Acts and *Congressional intent to give the fullest scope to State policy* as embodied in those State statutes. This appears from the following statements on page 2 of the report:

"GENERAL STATEMENT

"The *sole objective* of this proposed legislation is to *permit the public policy*[47] *of States having 'fair trade acts' to operate* with respect to interstate contracts for the resale of goods within these States. The fair-trade acts referred to legalize the maintenance, by contract, of resale prices of branded or trade-marked goods which are in free competition with other goods of the same general class. * * *

[44] 81 Cong. Rec. p. 34.

[45] 81 Cong. Rec. p. 2133.

[46] H. R. Rep. No. 382, Part 1, 75th Cong. 1st Sess.

[47] As the description and analysis of these State Acts later in the report shows, the "public policy" of these States with respect to such "contracts" clearly included making the minimum prices set up by such contracts effective against non-signers on notice.

"STATE FAIR TRADE ACTS

"State fair trade acts *typically provide*, first, that contracts may lawfully be made which provide for maintenance by contract of resale prices of branded or trademarked competitive goods. *Second, that third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it.*

"The pertinent provisions of the Illinois Act, recently held constitutional by the Supreme Court in the case of *Old Dearborn Distributing Co. v. Seagram-Distillers Corporation* (decided December 7, 1936) read as follows:

"'Section 1 * * * [48]

"'Sec. 2. Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this Act, *whether the person so advertising, offering for sale, or selling is or is not a party to such contract*, is unfair competition and is actionable as such at the suit of any person damaged thereby." [49]

The report then lists the twenty-eight states which up to that time had adopted Fair Trade Acts, and also lists other states where such a legislative proposal was pending in various stages.

Under the heading "ECONOMIC ASPECTS", the report recites (p. 3):

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[48] The report at this point embodies *verbatim* the language of Section 1 of the Illinois Fair Trade Act as set out in the opinion of this Court in *Old Dearborn Distributing Company vs Seagram-Distillers Corporation* 299 U.S. 183, at pp. 185-6. It is typical Section 1 language in the Fair Trade Acts.

[49] This language is also copied *verbatim* in the Committee report from the statement of this Court in the *Old Dearborn* case. The language of the Illinois Act thus quoted is *identical* with the corresponding provisions of other Fair Trade Acts, including the Louisiana and California Acts. See *Pep Boys v. Pyroil Sales Co.*, 299 U.S. 198 (1936).

"However, in the opinion of the committee, those arguments are more properly addressed to the State legislatures considering the enactment of fair trade acts. It is the legislature's responsibility to fix the public policy of the State. *This legislation merely seeks to help effectuate a public policy so fixed in a State.* It has no application to any State which does not see fit to enact a fair trade act."

The report concludes as follows (pp. 3-4):

"EFFECTUATION OF STATE PUBLIC POLICY

"Your committee respectfully submits that sound public policy on the part of the Federal Government lies in the direction of *lending assistance to the States to effectuate their own public policy with regard to their internal affairs.* It is submitted that this is especially true where such assistance, as in this instance, consists of removing a handicap resulting from the surrender of the power over interstate commerce by the States to the Federal Government."

Representative Celler, joined by Representative Ramsey, filed a supplemental report, criticising the background of the legislative proposal in some respects, but expressing an intent to vote for the bill.[50] This supplemental report contains the following *specific reference to the non-signer provisions in these State Acts* (p. 24):

"It must be kept in mind that the Supreme Court in upholding two State laws of the type H. R. 1611 is intended to facilitate, did not sustain price fixing as an end. The Supreme Court merely *upheld price-fixing contracts involving trade-marked articles in open competition, as binding on all (on notice as to their existence)*, as a means to the end of protecting intangible rights in the trade marks from destructive selling. * * *"

[50] H. R. Rep. No. 382, part 2, 75th Cong., 1st Sess.

Transmittal to Senate by the President of Letter from Chairman of Federal Trade Commission

On April 24, 1937, President Roosevelt addressed a communication to the President of the Senate, urging that consideration of this proposed legislation be deferred "until the whole matter can be more fully explored." [51]

Attached to this communication was a letter addressed to the President by the Chairman of the Federal Trade Commission,[52] which is of major significance in this legislative history. *That letter categorically states that the pending legislation would make the non-signer provision of State Fair Trade Acts "binding upon interstate commerce."*

The letter from the President read in part as follows:

> "* * * I requested the Chairman of the Federal Trade Commission to give me a *recommendation* on this bill, and I *attach his reply* on behalf of the Commission." [53]

In the communication from the Chairman of the Federal Trade Commission thus transmitted to Congress by the President the following pertinent and important language appears.

> "The Tydings-Miller bill would amend the anti-trust laws so as to legalize contracts and agreements fixing minimum resale prices for goods sold in interstate commerce and resold within the jurisdiction of any State where such contracts or agreements as to intrastate commerce have been legal-

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[51] 81 Cong. Rec. p. 3838. This letter was received and read in the Senate on April 27, 1937, and with the accompanying papers was ordered printed. They were thereupon printed as S. Doc. No. 58, 75th Cong., 1st Sess.

[52] S. Doc. No. 58, 75th Cong., 1st Sess., pp. 2-3.

[53] S. Doc. No. 58, 75th Cong., 1st Sess., p. 1.

ized. *A number of States now have such statutes.*

"Many of these State laws and the Tydings-Miller bill are *directly and irreconcilably in conflict with the present Federal law* on resale price maintenance. Public policy since the passage of the Sherman Antitrust Act in 1890 has been opposed to resale price maintenance. Numerous court decrees have been entered under the Sherman Act and numerous orders to cease and desist have been issued by this Commission and affirmed by the courts in conformity with the public policy expressed in the Sherman Act and in the Federal Trade Commission Act. Enactment of the Tydings-Miller bill would in its practical effect void such decrees and orders and constitute a reversal of what has been public policy for many years.

"*Since State laws* legalizing resale price maintenance *differ* in the various States, and since under the proposed Federal legislation Federal exemption from the antitrust laws would be conditioned upon the legality of similar contracts in intrastate transactions, the Tydings-Miller bill *would modify the antitrust laws in differing degrees in different states.* Thus, not only would it leave the Federal antitrust laws in full force and effect as to those States which do not legalize resale price maintenance, but there would be *divergent policies as to those States which legalize resale price maintenance, because of the differing terms of the different statutes in the respective States.* Thus, the Federal Government would be under the necessity of attempting to enforce divergent regulatory policies toward shipments made by the same manufacturer to dealers located in different States, because of the differences in the respective State statutes

"A *peculiar feature* of many of the State laws *which would, under a recent decision of the Supreme Court,* speaking through Mr. Justice Sutherland (57 S. Ct. 147), *thus be made binding*

> *upon interstate commerce* is that they *require wholesalers and retailers to conform* to the provisions of private resale price maintenance contracts *to which they are not parties.* Thus a private contract, the provisions of which are determined without public hearing and apart from any public supervision as to reasonableness, is made binding upon *all* dealers *and* the consuming public." [54]

The letter of the President transmitting these observations itself quoted the following significant language contained in the communication from the Chairman of the Federal Trade Commission:

> "* * * Indeed, the Commission says: 'There is great probability that manufacturers and dealers may abuse the *power to arbitrarily fix resale prices* by unduly increasing prices, resulting in bitter resentment on the part of the consuming public, especially in this period of rising prices.'" [55]

All of this language in the communication from the Chairman of the Federal Trade Commission, which was particularly directed to the attention of Congress by the President, is consistent only with an understanding that the legislation contemplated a system of resale-price maintenance *effective, wherever local laws so provided, against non-signers* as well as against those resellers voluntarily entering into resale price maintenance agreements. The language is to be read in the light of the fact that the Chairman of the Federal Trade Commission had had direct contact with the progress of the legislative proposal and was especially informed on the subject. He and the General Counsel of the Commission had attended, on invitation, a meeting of the House Judiciary Committee

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[54] S. Doc. No. 58, 75th Cong., 1st Sess., pp. 2-3.
[55] S. Doc. No. 58, 75th Cong., 1st Sess., pp. 1, 3.

for a discussion of H. R. 1611.[56]

The use made of the President's letter and the communication from the Chairman of the Federal Trade Commission therewith enclosed, by Senator King, the leading opponent of this legislative proposal in the Senate, is detailed hereinafter.[57]

Senate Committee Report on H. R. 7472.

H. R. 7472 was a bill providing additional revenue for the District of Columbia. When this bill reached the Senate and was considered by the Committee on the District of Columbia, it was the subject of a *committee amendment incorporating therein as Title VIII the substance of S. 100 and H. R. 1611.* The Committee, by a vote of 11 to 1, then reported this bill *favorably with this amendment.*[58]

The majority report described Title VIII as follows:

> "Title VIII of this bill, as reported by your committee, includes a provision amending the anti-trust laws which *incorporates the provisions of S. 100,* which was reported from the Committee on the Judiciary on March 29, 1937. In reporting S. 100 the Committee on the Judiciary incorporated a report on a similar bill (S. 3822) which was made during the Seventy-fourth Congress. That report which is also applicable to S. 100 and Title VIII of this bill, is as follows." [59]

The report then reproduces what was said by the

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[56] 81 Cong. Rec. p. 8140.

[57] The first use of this material by Senator King was to employ it as the basis for deferring action on S. 100 when it was to come up for consideration on May 3, 1937; 81 Cong. Rec. pp. 4083-4084.

[58] S. Rep. No. 879, part 1, 75th Cong., 1st Sess. This report also included other amendments to portions of the bill not relating to resale price maintenance.

[59] S. Rep. No. 879, 75th Cong., 1st Sess., part 1 p. 5.

report on S. 100,[60] which in turn is a reproduction of the committee report on S. 3822 at the preceding session.[61]

Senator King, in a *minority report*,[62] vigorously opposed Title VIII of H. R. 7472. In his report he quoted in full the letter from the President and the attached communication from the Chairman of the Federal Trade Commission [63] expressing the view that the pending legislative proposal would make the *non-signer* provisions in State Fair Trade Acts *"binding upon interstate commerce"*. He added his own expression of views on that particular subject as follows:

> "And it should not be forgotten that these price contracts are not necessarily made with each wholesaler or retailer who resells the goods. The Supreme Court has always *held valid*, in the California and Illinois cases, the section in these State laws that allows the manufacturer or wholesaler by having only one contract in the State to force his fixed price on other dealers within the State by *merely giving such other dealers notices of the contracts* * * * "[64]

Senator King's minority report was followed by a vigorous fight on his part on the Senate floor against this legislative proposal. There again he *fully presented* the point that the effect of the proposed legislation was to *embrace and make operative the non-signer provisions* in State Fair Trade Acts.[65]

Senate Action on Title VIII of H. R. 7472.

The Committee report [66] was presented by Senator

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[60] S. Rep. No. 257, 75th Cong., 1st Sess., *supra*, pp. 40-41.
[61] S. Rep. No. 2053, 74th Cong., 2d Sess.
[62] S. Rep. No. 879, part 2, 75th Cong., 1st Sess.
[63] S. Doc. No. 58, 75th Cong., 1st Sess., pp. 1-3; *supra*, pp. 44-47.
[64] S. Rep. No. 879, part 2, p. 6, 75th Cong., 1st Sess.
[65] *Infra*, pp. 49-51.
[66] S. Rep. No. 879, part 1, 75th Cong., 1st Sess.

McCarran on July 7, 1937.[67] The minority report[68] was presented by Senator King on July 8, 1937, and ordered printed.[69]

Title VIII of H. R. 7472 was debated and acted upon favorably on June 23, 1937.[70] Senator King spoke vigorously and at length against the measure.[71] He *read in full* to the Senate[72] the letter from the President, and also the accompanying *communication from the Chairman of the Federal Trade Commission*, which referred specifically to the *non-signer provisions* in State Fair Trade Acts and expressed the view that, under the decision of this Court upholding those statutes, the proposed legislation would make these provisions "*binding upon interstate commerce.*"[73] Later on, he stated in his own language his joinder in these objections:

> "My protest is first against the bill itself. I think the President was right in pointing out its evils, and *the Federal Trade Commission was right in its objections*, as stated in the letter to the President."[74]

Senator King also *related* the proposed legislation to the *non-signer provisions* in State Fair Trade Acts in the following language:

> " * * * If the rider is adopted and becomes law, it will permit manufacturers and distributors in New York, for instance, to enter into contracts with retailers in California, and to fix and maintain retail prices, though monopolies in the com-

[67] 81 Cong. Rec. p. 6871.
[68] S. Rep. No. 879, 75th Cong., 1st Sess., part 2.
[69] 81 Cong. Rec. p. 6892.
[70] 81 Cong. Rec. pp. 7486-7497.
[71] 81 Cong. Rec. pp. 7487-7494.
[72] 81 Cong. Rec. p. 7490.
[73] S. Doc. No. 58, pp. 1-3, 75th Cong., 1st Sess.; *supra*, pp. 44-47.
[74] 81 Cong. Rec. p. 7493.

modities referred to might result. And I might add that in California and other States *it has been held* that if the retail vendee gives *notice* to the public of his price-fixing contract with the distributor or manufacturer in New York *no other person in the State may sell the commodity at a price below* that fixed in such contract.

"I might add, in passing, that the Federal antitrust laws would not have the same meaning in all States. In those States where laws are passed permitting resale price fixing the efficacy of the Federal statutes would be impaired, but in those States which have not legalized price fixing, the antitrust laws would be effective. In the communication of the Chairman of the Federal Trade Commission it is clearly indicated that the enactment of the rider *would modify the antitrust laws in differing degrees in different States.* It would leave such laws in full force and effect in those States which did not legalize resale-price maintenance; but there would be *divergent policies in those States which legalize resale-price maintenance;* and the result would be that the Federal Government would be under the necessity of attempting to enforce divergent regulatory policies toward shipments made by the same manufacturer to dealers located in different States." [75]

The following colloquy between Senator King and Senator Frazier shows further recognition that the resale price maintenance to be authorized by the proposed legislation would *go beyond voluntary contractual resale price maintenance* by retailers willing to so contract:

"MR. FRAZIER: I should like to ask the Senator from Utah if he understands that this amendment—title VIII—would allow manufacturers *to fix the prices at which retailers* must sell their products to consumers.

[75] 81 Cong. Rec. p. 7491.

> "MR. KING. In reply may I say that if this amendment shall be enacted into law, it would seriously weaken the antitrust laws in all States which have enacted laws permitting the fixing of minimum prices for the resale of commodities. In fact, the enactment of the amendment *would permit manufacturers and distributors to fix prices at which retailers must sell their products* to consumers in those States which have enacted laws permitting minimum prices for the resale of commodities." [76]

It is significant that *neither Senator Tydings*, nor any other *proponent* of this legislation, *challenged or disputed* these assertions of Senator King [77] that the proposed lifting of the ban of the Sherman Act in the field of resale price maintenance would *extend* to the consequences of the *non-signer* provisions in State Fair Trade Acts.

Obviously, Senator Tydings, or some other proponent of this legislation, would have promptly challenged these statements by opponents of the legislation as to its purpose and effect *if the statements had been considered erroneous.*

Senator Tydings spoke briefly for the measure.[78] He emphasized the point that this legislation would *leave the subject of "fair trade practices" in each State to the local legislature*, saying:

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[76] 81 Cong. Rec. pp. 7491-7492.

[77] Including the quotation by Senator King of the view of the Chairman of the Federal Trade Commission to this effect.

[78] 81 Cong. Rec. pp. 7495-7496. The report of the debate shows a statement by Senator Tydings that he had brought this proposed legislation to the Senate floor as a rider to H. R. 7472 because Senator King had blocked consideration of S. 100 (pp. 7492-7493, 7495). Opposing counsel comment (p. 30) upon the legislative procedure utilized by the proponents of the bill, but this seems of no importance in the present discussion.

"MR. TYDINGS. What we have attempted to do is *what 42 States have already written* on their statute books. It is simply to *back up those acts*, that is all; to have a *code of fair trade practices written* not by a national board such as the N.R.A. but *by each State*, so that the people may go to the State legislature and correct immediately any abuses that may develop. We are trying to *decentralize* fair trade practices * * *"

* * * * *

"* * * * as 42 States have *already enacted similar legislation*, I ask, on the further ground of State rights and decentralized government, that the *action* of these 42 States be *supported*." [79]

Of particular significance is the following colloquy between Senator Barkley and Senator Tydings, in which the former expressed approval of the proposition that this legislative proposal *left the matter for determination by each State*, in contrast to former legislative proposals for a uniform Federal rule of law as to resale price maintenance:

"MR. BARKLEY" * * *

I desire to ask the Senator if that is to be interpreted to mean that the contracts which are permitted under this proviso are permitted so long as the articles are in free and open competition, and *so long as the State in which they are sold permits that sort of contract to be entered into and enforced.*

"MR. TYDINGS. That is correct.

"MR. BARKLEY. What would be the effect of a law of this kind in a State where there was no such authority to enter into contracts of this kind?

[79] 81 Cong. Rec. p. 7496.

"MR. TYDINGS. The State law would prevail.

"MR. BARKLEY. So the proposed legislation would not in any way infringe upon State laws that might prohibit that sort of contract?

"MR. TYDINGS. Not in the slightest degree.

"MR. BARKLEY. I will say to the Senator that of course that is *quite different* from the provisions which have been contained in similar legislation which has been pending in Congress ever since I have been here.

"MR. TYDINGS. That is true.

"MR. BARKLEY. And, in my judgment, the *change very much improves* the proposed legislation." [80]

Senator Austin also spoke in favor of the measure. He said:

"MR. AUSTIN. * * * As has been pointed out, *42 States* have enacted similar statutes *declaring what they call fair-trade practices* with respect to prices, and preventing price cutting, which is unfair and which tends to drive little men out of business. On the other hand, my own State, the State of Vermont, has exercised its independence and its right as a sovereign State to say, 'We do not want price fixing in this State.' Therefore, the State of Vermont can declare its own policy and have it effective with the cooperation of the Federal Government if this measure is enacted, because, if that is done, no manufacturer doing business in another State and transporting his goods into the State of Vermont can say there that the resale price of his product shall be so much and no less. Whether or not that is wise I am not un-

[80] 81 Cong. Rec. pp. 7495-7496. This comment is of importance in connection with petitioners' argument as to the Kelly-Capper bill which had been introduced in many earlier sessions; see *infra*, pp. 64, 75-78.

dertaking to argue. The point is that it is more important to the people of the United States of America to save fundamental institutions than it is to declare themselves upon a mere matter of economic policy. I am more in favor of preserving the independence of the several States, and *their right to manage their own affairs* than of fixing prices." [81]

The contention that Congress intended the local rule to govern only in the contractual aspect of resale price maintenance, and not in the non-signer aspect of that problem, is wholly inconsistent with the views thus expressed by Senators Tydings and Austin and approved by Senator Barkley.[82]

House Action on Title VIII of H. R. 7472.

The House *voted not to concur* in the Senate amendments to H. R. 7472 and conferees were accordingly

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[81] 81 Cong. Rec. p. 7496.

[82] We have just been served with a copy of the Government's *amicus* brief in this case, which quotes (p. 26) Senator Vandenberg as stating that not five percent of the membership of the Senate would know anything whatever about the amendment when the Senate voted on it (81 Cong. Rec. p. 7492). This language is not entitled to any weight in the light of the extensive quotations which we have made from the debates. Obviously, Senator Vandenberg was pressing for an adjournment (it was July 23rd). We imagine that similar comments as to lack of understanding of the Senate will be found in many passages in the Congressional Record as to many measures.

Senator Vandenberg's remarks may be contrasted with the remarks of Senator Barkley, made a few minutes later and appearing on the next following page of the Congressional Record, when Senator Barkley said:

> "But the bill is here, it is a part of the measure now before us, and we have to vote on it before the tax bill can be disposed of * * * That being true and the proposal in title 8 *being well understood*, I express the hope that we may arrive at a vote on it without unnecessary delay, so that Senators may express their feelings about it * * ** " (81 Cong. Rec. p. 7493).

After these remarks by Senator Barkley there ensued further debate extending over several pages (81 Cong. Rec. pp. 7493-7497). The amendment was then agreed to without a record vote (see 81 Cong. Rec. p. 7497).

appointed.[83] The Conference Report recommended that the House recede from its disagreement with the Senate amendment embodied in Title VIII.[84] On August 3, after debate on this recommendation in the House,[85] that body *voted to recede* from its disagreement with this amendment and also adopted the Conference Report in other respects.[86]

Representative Dirksen, one of the House conferees, said:

> " * * * I might say that I did favor and do favor the enactment of the Miller-Tydings bill. *It resulted from an Illinois case that went to the Supreme Court.* The Illinois Legislature had enacted a law prior to 1936 making it *possible for the manufacturer of merchandise to set the price at which it must be resold.* In other words, it *empowered the manufacturer to tell the retailer what he must get as a retail price* and if he refused to do so, the manufacturer could refuse to sell him further and also had an action at law. It so happened that the Seagram's Distillers Corporation, located in Indiana, sold some of its products to the Old Dearborn Distributing Co. in Chicago. Evidently, the distiller indicated the price at which the liquors must be sold and when the distributer refused to abide by such a price, there was a violation and court action. Thus the case found its way to the Supreme Court on a question of constitutionality of the statute. The Court ruled that this was a *matter of policy for the States to determine*, and thereby upheld the Fair Trade Act of Illinois.
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> "A question then arose as to whether or not

[83] 81 Cong. Rec. pp. 7497, 7599. Senator King was one of the Senate conferees and thus had full opportunity to present his opposing views to the House conferees.

[84] 81 Cong. Rec. pp. 8134-8137.

[85] 81 Cong. Rec. pp. 8137-8143.

[86] 81 Cong. Rec. p. 8143. The Senate on August 4, 1937, agreed to this Conference Report without further debate; *ibid.* 8166-8168.

> the maintenance of such resale prices under a State fair trade act might not be in violation of the Sherman Anti-Trust Act of 1890 insofar as these transactions sprang from a contract in interstate commerce. This question was presented to the House Judiciary Committee and there determined by the reporting of the Miller bill. It was *essentially nothing more than an enabling act which placed the stamp of approval upon price maintenance transactions under State acts, notwithstanding the Sherman Act of 1890.*" * * * [87]

Representative Dirksen evidently fully understood that this "*enabling act*" extended to the non-signer provisions of State Fair Trade Acts.

Representative Gulkin, speaking upon the Conference Report, referred to the decision of this Court in the *Old Dearborn* case, saying:

> "* * * The report of the proponent of the bill, Mr. Miller, calls attention to the *opinion of Judge Sutherland*, upholding the constitutionality of the Illinois Price Fixing Act." [88]

The final speaker in the House was Representative McLaughlin, a member of the Judiciary Committee and of the subcommittee which conducted hearings on H. R. 1611.[89] He opened his remarks by emphasizing the *intent* of the proposed legislation to give full *scope* to State Fair Trade Acts:

> "In these remarks I shall refer to the Miller-Tydings amendment, which is included in the conference report, as H. R. 1611.
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> "House bill 1611 is known as the Fair Trade *Enabling Act* because it is an act which *enables* fair-trade legislation passed by individual State

[87] 81 Cong. Rec. p. 8138.
[88] 81 Cong. Rec. p. 8139.
[89] 81 Cong. Rec. p. 8140. On behalf of the subcommittee he had reported the bill to the full Committee.

legislatures to become effective and to be *fully operative* within the respective States. It is *not* legislation which puts into effect a *new national policy* originating in Congress. Rather it is legislation which helps the States to put into effect a policy originating within the States themselves. It constitutes a method through which States are enabled to enforce their laws through the cooperation of the Federal Government. It lends to the States the assistance of the national legislation *making effective fair-trade practice acts* passed in the State legislatures."

"* * * A hearing was had on the bill before the Rules Committee and the committee passed a resolution for a rule. The bill has passed through the conventional course of procedure and the standing committee who have thoroughly considered it recommended to the House that it be enacted into law, *in order that the fair-trade practice acts passed by so many of the States of the Union may become vital laws, fully operative* and capable of performing the great service which they are designed to perform." [90]

In concluding his speech in the same vein Representative McLaughlin said:

"The States in which the acts have operated are satisfied with them. The other States which have recently enacted them based their enactment upon the beneficial results shown in the States where they have been in operation. However, State fair-trade practice acts have *never* had an opportunity to function *fully*, and they *never* will operate with *complete effectiveness*, nor produce the full benefit which they are capable of producing *until the removal of the existing Federal barrier* by the passage of the Miller-Tydings Fair Trade Practice Act, H. R. 1611. That act is now before us as an amendment to the conference re-

[90] 81 Cong. Rec. p. 8140.

port under consideration.

> "Forty-two States of the Union today look to the House of Representatives to pass this law which will *remove the barrier* now standing in the way of the *full and complete operation* of the respective State fair-trade practice acts".[91]

This language unquestionably reflects a clear purpose and intent to make the respective State statutes completely effective in their respective localities. The contention that Congress, in amending the Sherman Act, intended to give effect to only the signer provisions and not the non-signer provisions in these state laws, in transactions wherein such laws might clash with the unamended Sherman Act, is *totally at variance* with the broad and sweeping concepts thus repeatedly expressed.

Significant also here is the following description by Representative McLaughlin of the typical "State fair-trade practice act", including *express mention* of the *non-signer* provisions:

> "The State acts are substantially identical. They were enacted by the individual State legislatures and represent the wishes of the people of the respective States. The wisdom and soundness of the legislation has been passed upon by 42 State legislative bodies. H. R. 1611 will in effect *confirm and ratify* the judgment of the State legislatures which have passed *State fair-trade practice acts.* * * *
>
> "In other words, a State fair-trade practice act is an act which allows a seller of a trademarked or identified commodity and the purchaser of such commodity to agree that the purchaser of that commodity shall not sell the commodity at less than the price agreed upon between the buyer and the seller where the commodity is one

[91] 81 Cong. Rec. p. 8143.

which is in open competition with commodities of similar character. The State fair-trade practice acts in the respective States *practically uniformly provide that any retailer* selling a trade-marked commodity which comes within the provisions of the act, *knowing* that the owner of the commodity has provided by contract that the articles shall not be sold at less than a certain price, is *bound* by that contract *although he may not be a party to it*, and is liable for the penalties set up in the act against those who sell the trade-marked article at a price less than the price named as the selling price by the owner."[92] * * *

In language equally significant and important, Representative McLaughlin detailed as follows the refutation within the Committee of arguments against the proposed legislation, predicated upon the non-signer provisions in the State Acts:

"In the hearings before the committee and in the debates upon the bill in the committee itself, it was suggested that there are two points which may be considered in the nature of objections to the bill. The committee discussed these points and considered that they did not constitute valid objections. However, *in order to present the matter fully* to the House, these objections should be referred to. These objections are:

"First, That H.R. 1611, if enacted, would impose a penalty upon a seller of merchandise for selling such merchandise below the minimum price agreed upon in a contract *to which he is not a party*."

* * * * *

"The objections were overruled by the committee after a consideration of the testimony bearing upon them and after full discussion of the objections.

[92] 81 Cong. Rec. pp. 8140-8141.

"The first objection, namely, that H. R. 1611, if enacted, will permit resale contracts to be binding upon parties *other than the parties to the contract itself*, is fully answered by the statement that *the respective State laws make provision that the contract shall be binding upon all those who sell the trade-marked article which is the subject of the resale contract whenever the person selling the article below the contract resale price does so willfully and knowingly.* This argument is well answered by the *controlling opinion of the Supreme Court of the United States* in the case of Old Dearborn against Seagram, *supra*, upholding the validity and constitutionality of the Illinois State Fair Trade Practice Act, where the Court says: [93]

" 'A challenge is directed against section 2, which provides that willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract made under section 1, *whether the person doing so is or is not a party to the contract*, shall constitute unfair competition, giving rise to a right of action in favor of anyone damaged thereby.

" 'It is first to be observed that paragraph 2 reaches not the mere advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things willfully and knowingly. We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of *a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds willfully to resell in disregard of it.*

" 'Appellants here acquired the commodity in question with full knowledge of the then-existing

[93] The quoted language in the next three paragraphs is that of this Court in the *Old Dearborn* case, 299 U. S. at pp. 193-194.

restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealings, assent to the protective restriction, with consequent liability under paragraph 2 of the law by which such acquisition was contained.'

"Further complete answer to this objection is that *the respective States in the exercise of their wisdom and judgment* imposed the penalties provided in the respective State acts. The bill before us today, if enacted, *merely makes effective the law which has been enacted by the respective State legislatures to govern transactions within their own borders.*" [94]

This strong exposition by Representative McLaughlin of the *intent* of this "*enabling act*" to make the non-signer clause effective and of the legislative purpose to give *full scope* to every State Fair Trade Act in its locality, was followed by the adoption of the Conference Report within any further discussion.[95]

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[94] 81 Cong. Rec. p. 8142.

[95] 81 Cong. Rec. p. 8143.

Opposing counsel, obliged to admit (pp. 89-92) that Representative McLaughlin definitely expressed the understanding that the legislative proposal under debate would extend to the non-signer provisions of the State Acts, seek to avoid the effect of this circumstance by suggesting that "apparently" Representative McLaughlin was "unaware" that the phrase "or other conditions" contained in H. R. 1611 had been omitted from H. R. 7472, Title VIII, so that he did not understand what he was talking about. We show *infra*, pp. 65-69, that the phrase referred to has no importance in the present controversy. Apart from this, the statement by Representative McLaughlin during the course of the debate leaves no doubt that he was completely informed as to the history, background and purpose of the legislation. See 81 Cong. Rec., p. 8140, recording Representative McLaughlin's statement in which he referred to the many witnesses who had been heard by the subcommittee, of which he was a member, the briefs and statements which it had considered, and the long study and discussion, following which he had been commissioned to report the bill favorably to the full Committee on the Judiciary.

Legislative Proposals on Resale Price Maintenance at Prior Sessions of Congress

Substantially the same bill which was introduced in the First Session of the 75th Congress as S. 100 and H. R. 1611, had been introduced as S. 3822 in the Second Session of the 74th Congress. The legislative history of this unenacted measure at this prior session appears to us to have very little weight, in view of the substantial and significant legislative history materials found in the progress of the legislation towards enactment at the First Session of the 75th Congress. However, the legislative history of S. 3822 at the preceding session, insofar as it has any significance on the issues in litigation, fully supports our position.

S. 3822 was introduced by Senator Tydings on January 27, 1936, and was referred to the Senate Judiciary Committee.[96] That committee reported favorably with a report[97] reproduced in the report made by committees at the following session on S. 100 and H. R. 7472.[98]

S. 3822 came up in the Senate and was passed on June 1, 1936.[99] The only discussion was the following statement by Senator Tydings, in response to a request by Senator McKellar for explanation of the bill, which had just been read:

> "MR. TYDINGS. In reply to the Senator from Tennessee let me say by way of brief explanation that this bill was reported unanimously from the Committee on the Judiciary after hear-

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[96] 80 Cong. Rec. p. 1007.

[97] S. Rep. No. 2053, 74th Cong., 2nd Sess.; 80 Cong. Rec. p. 7565.

[98] S. Rep. No. 257, 75th Cong., 1st Sess.; S. Rep. No. 879, part 1. 75th Cong., 2nd Sess.; see *supra*, pp. 40-41, 47-48.

[99] 80 Cong. Rec. p. 8433.

> ings were held. It grows out of the fact that *12 states*—New York, *Illinois*, Pennsylvania, New Jersey, Oregon, Washington, Wisconsin, Iowa, Maryland, Ohio, Virginia, Rhode Island, and *California*—have all adopted acts within their states regulating loss-leader selling and the making of contracts between a manufacturer and a distributor of an article. This has been done in an effort to make trade equal and fair and to eliminate discrimination. After hearings, the Committee reported the bill unanimously and favorably. It simply *backs up the action of those states* which have already enacted *valid laws* which have been *passed on by the courts*."

It will be noted that Senator Tydings, in this explanatory statement, mentions "*loss-leader selling*" [100] as well as "the making of contracts between a manufacturer and a distributor", as regulated by the "valid" State laws to which he referred. It also will be noted that he used the expression "*backs up the action of those states*" in speaking of his bill. It will finally be noted that he refers to the *courts having "passed on"* these "*valid laws*" enacted by the states which he mentions.

While, at the date on which Senator Tydings thus spoke (June 1, 1936), this Court had not passed on the constitutionality of State Fair Trade Acts,[101] the court of last resort of California had then already upheld the con-

[100] The reference to "loss-leader" selling further evidences the understanding that the legislation under discussion would make operative in interstate commerce the non-signer provisions in the State Fair Trade Acts, since the practice of "loss-leader" selling could not be dealt with effectively if resale price maintenance depended only on voluntary agreements and third persons with notice were not bound. A reseller addicted to the practice of "loss-leader" selling could not be expected to become a voluntary party to a resale price maintenance contract.

These comments apply to other references in the debates and reports to "loss-leader" selling.

[101] The decision of this Court in the *Old Dearborn* case was rendered on December 7, 1936.

stitutionality of the Fair Trade Act of that State, with *particular* reference to and emphasis upon the *non-signer* provisions (Section 2) and so had the lower state courts in Illinois.[102] Senator Tydings obviously referred to these decisions when he spoke of the courts having "passed upon" these "valid" State laws.

After being passed by the Senate on June 1, 1936, S. 3822 progressed no further at the second (and final) session of the 75th Congress, which adjourned on June 20, 1936.[103]

The resale price maintenance bills in earlier sessions of Congress, which are referred to by opposing counsel had a much more remote relationship to the legislative proposal adopted in 1937. These earlier bills, antedating the development of State Fair Trade Acts and the jurisprudence thereunder, proposed a Federal statutory rule on resale price maintenance. Congress, being unwilling to enact a rule, turned the problem over to the States through the Miller-Tydings Amendment. There is significance in the contrast between what was proposed and not done in the earlier years, and what was done in 1937, with a demonstrated clear Congressional intent "*to decentralize fair trade practices*".[104]

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[102] *Max Factor Co. v. Kunsman*, 5 Cal. 2d. 446; *Pyroil Sales Co. v. Pep Boys*, 5 Cal. 2d. 784. These decisions were rendered on February 27, 1936, and rehearing applications were denied on March 26, 1936. While the similar decisions by the Illinois Supreme Court were not rendered until June 10 and June 17, 1936 (*Joseph Triner Corp. v. McNeil*, 363 Ill. 559; *Seagram-Distillers Corp. v. Old Dearborn Distributing Co.*, 363, Ill. 610), the decisions of lower Illinois courts, which were subsequently affirmed by the Illinois Supreme Court, had been rendered some time prior to June 1, 1936.

[103] 80 Cong. Rec. pp. 10549, 10893.

[104] Senator Tydings in 81 Cong. Rec. p. 7496. See *infra*, pp. 51-52.

There Are No Differences Between the Language of the Miller-Tydings Amendment and the Language of S. 100 and H.R. 1611 Which Are of Any Significance in the Present Controversy.

Various changes in language were proposed or made as the legislative proposal, which culminated in the Miller-Tydings Amendment, progressed from introduction to adoption at the first session of the 75th Congress. We will limit our discussion to the two changes which opposing counsel claim to have significance.

As orginally introduced, both S. 100 and H. R. 1611 proposed to lift the ban of the Sherman Act from "contracts or agreements prescribing minimum prices or other conditions for the sale of a commodity * * * when contracts or agreements of that description are lawful as applied to intrastate transactions". When this legislative proposal became Title VIII of H. R. 7472 in the Senate Committee on the District of Columbia, the phrase "or other conditions" was dropped.

Opposing counsel argue (pp. 56-57, 83-87) that this change in language was made presumably to meet the point urged in the communication from the Chairman of the Federal Trade Commission [105] that the proposed legislation would make the non-signer provisions in State Fair Trade Acts "binding upon interstate commerce". This argument was made in *Pepsodent Co. v. Krauss Co.*, and was there rejected by Judge Borah, who said on the point:

> "The defendant seeks to make much of the fact that the words 'or other conditions' were omitted from the original text of H. R. 1611 and S. 100 when the Miller-Tydings Act was added as

[105] S. Doc. No. 58, 75th Cong., 1st Sess.

> a rider to H. R. 7472. It is argued that H. R. 1611 and S. 100 sought to legalize contracts of a much broader scope than does H. R. 7472; * * * "
>
> "The defendant's argument is not persuasive. Since the present controversy *relates wholly to prices*, the omission of the words '*or other conditions*' from the measure as finally enacted *could not possibly have a bearing upon the present issue.*" [106]

The view expressed by Judge Borah is obviously correct. The non-signer provisions (Section 2) in State Fair Trade Acts do not depend for their effectiveness upon any recitals of "other conditions" in the resale price maintenance agreements legalized by such statutes. All that is requisite for Section 2 to be operative is that (1) an agreement prescribing minimum prices shall have been entered into with other resellers, and (2) the non-signer, against whom Section 2 is to be invoked, shall have had notice of those agreements.

The legislative record does not state why this phrase "or other conditions" was dropped when this legislative proposal was written into H. R. 7472 as Title VIII. The only reference to this phrase in the whole legislative history appears in the separate report of Representative Celler, joined by Representative Ramsey, on H. R. 1611. In this report [107] it is asserted that this language would open

> "the road to sales contracts tying together two different products, while legislation is pending before Congress to outlaw that very practice."

This objection, *wholly unrelated to the non-signer aspect* of State Fair Trade Acts, furnishes a possible

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[106] 56 F. Supp. at pp. 926-927.
[107] H. R. Rep. No. 382, part 2, p. 6, 75th Cong., 1st Sess.

reason for the omission of these words when the legislative proposal was incorporated in Title VIII of H. R. 7472.[108]

Opposing counsel argue (pp. 86, 87) that the omission of the phrase "or other conditions" receives added significance when considered with another amendment which consisted in the insertion by floor amendment in the Senate,[109] of a specific prohibition against horizontal price-fixing agreements in Title VIII of H. R. 7472. The argument (pp. 56-57, 81-83) is that when Senator Tydings, in presenting this amendment, said that it eliminated objection or opposition which "the administration" had expressed to the legislation, he meant that what had removed this objection or opposition was the antecedent dropping of the phrase "or other conditions" plus the floor amendment prohibiting horizontal price-fixing agreement.

That such was not the situation, and that what Senator Tydings said about eliminating opposition or objection from "the administration", *related only to his floor amendment prohibiting horizontal price fixing*, will appear beyond question from the following quotation of the full presentation of this floor amendment by Senator Tydings:

> "MR. TYDINGS. Mr. President, I offer an amendment to the committee amendment, which I ask to have stated.

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[108] The fact that the legislative record nowhere contains any statement or explanation as to why the words "or other conditions" were dropped from this proposed legislation at this stage makes pertinent the following observation in *Trailmobile Co. v. Whirls*, 331 U. S. 40, 61, (1947):

> "* * * Moreover, as has been noted, the most important committee changes relied upon were made without explanation. The interpretation of statutes cannot safely be made to rest upon *mute* intermediate legislative maneuvers."

[109] 81 Cong. Rec. p. 7487.

"The PRESIDING OFFICER. The amendment to the amendment will be stated.

"The CHIEF CLERK. On page 80, line 1, after '1914', it is proposed to insert a colon and the following:

'*Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers or between producers or between wholesalers or between brokers or between factors or between retailers or between persons, firms or corporations in competition with each other.'

"The PRESIDING OFFICER. The question is on agreeing to the amendment offered by the Senator from Maryland (Mr. Tydings) to the amendment reported by the committee.

"MR. TYDINGS. Mr. President, I am not going to make a speech now; but I should like to say that the amendment which I have just offered has been worked out by certain administration leaders and myself and is entirely satisfactory to me; and I think I am authorized to say that with that amendment the administration is not now opposed to this title of the bill.

"MR. KING. Mr. President, may I inquire of the Senator from Maryland for whom he speaks when he says 'the administration'?

"MR. TYDINGS. The Attorney General's Department.

"MR. KING. Will the Senator explain the purpose of the amendment and its significance?

"MR. TYDINGS. In my judgment, Mr. President, the amendment is unnecessary because the provision as now found in the bill allows none of the things which the amendment specifically

> eliminates; but, in order that there may be no misunderstanding and that the element of competition may be kept forward throughout the process projected in this measure, the amendment has been offered. I took up the matter with the Attorney General and *we worked out this amendment;* and so far as I know and believe, it is an accurate statement that forces which were formerly opposed to this title of the bill have no particular objection to it at the present time." [110]

Other Arguments of Petitioners on Legislative History Are Also Without Merit.

Opposing counsel stress (pp. 11, 49, 71-74, 88-89) references during Congressional consideration of this legislation to the making legal of what was condemned in *Dr. Miles Medical Co. v. Park & Sons,*[112] and to writing into law the dissent of Mr. Justice Holmes in that case.

There is no such limiting significance in these remarks. While the direct adjudication in the *Dr. Miles* case related to contractual resale price maintenance, the discussion in that opinion extended further, as shown in the following language:

> "Nor can the manufacturer by rule and *notice, in the absence of* contract or *statutory right,* even though the restriction be known to purchasers, fix prices for future sales." [113]

Accordingly, it appears that the non-signer provisions in State Fair Trade Acts, as well as the provisions legalizing resale price maintenance agreements,

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[110] 81 Cong. Rec. p. 7487. This explanation was repeated by Senator Tydings in a colloquy with Senator Schwellenback. See 81 Cong. Rec. p. 7496.

[112] 220 U. S. 373 (1911).

[113] 220 U. S. at p. 405.

represented the legalization of what the *Dr. Miles* decision had declared to be illegal.

While the dissent of Mr. Justice Holmes in the *Dr. Miles* case, like the prevailing opinion, dealt primarily with contractual resale price maintenance, the following passage in that dissent expresses a philosophy which *would apply with as much force to statutory resale price maintenance against non-signers* as it would to resale price maintenance agreements:

> * * * "I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution), as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. * * * "[114]

Furthermore, if there is any significance in the legislative references to the *Dr. Miles* case, then there must be even greater significance in the several references, in the history of the enactment of this legislation, to the recent decision in *Old Dearborn* case, wherein the constitutionality of State Fair Trade Acts, including particularly the *non-signer clause, had been considered and upheld.*[115]

Opposing counsel also attach significance (pp. 52, 54, 55, 77) to the fact that Senator Tydings made no specific mention or exposition of the *non-signer* provisions in State Fair Trade Acts, when he spoke in behalf of this legislation. The complete answer to this is that

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[114] 220 U. S. at p. 412.

[115] See *supra*, p. 36, for our argument on the significance of these references.

his main speech [116] came *after Senator King had mentioned the non-signer provisions repeatedly* in his opposing speech.[117] There was accordingly no need for Senator Tydings to mention the non-signer provisions unless he took issue with Senator King and the Chairman of the Federal Trade Commission in their expressed view that the pending legislative proposal embraced the non-signer provisions of State Fair Trade Acts, as well as the resale price maintenance agreement provisions thereof. We have already pointed out [118] that the fact that Senator Tydings did not deny these argumentative assertions of Senator King *clearly meant that he did not dispute them, indeed conceded them.*

Opposing counsel also emphasize (pp. 52, 53, 55, 78, 79, 84, 88) references to the pending legislation proposal as authorizing "agreements" or "contracts" for resale price maintenance. Here again, what was said accurately described one essential feature of the statutory plan.[119] Moreover, in the final debate in each branch of Congress, the *non-signer* provisions were also *specifically mentioned* and referred to at length,[120] without any sug-

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[116] 81 Cong. Rec. pp. 7495-7496.

[117] 81 Cong. Rec. pp. 7490-7491.

[118] *Supra*, p. 51.

[119] Opposing counsel criticize (pages 91-92) Representative McLaughlin for representing H. R. 1611 as a "permissive" act. Representative McLaughlin's statement is in accord with the language used by the Supreme Court of Wisconsin in upholding the Fair Trade Act of that State, in *Weco Products Company v. Reed Drug Company*, 225 Wis. 474 (1937), where the court said (pages 486-7):

> "The Fair Trade Act does not fix prices or require that prices be fixed. It does not regulate anything or anybody. It is permissive only * * * "

Doubtless, what the Supreme Court of Wisconsin and Representative McLaughlin had in mind, was that the Fair Trade Acts do not compel a manufacturer using a trademark, brand or name to establish a resale price; the case is not one of compulsory price fixing as in the case of statutes setting up State Boards with authority to fix obligatory prices. For a discussion of the difference between permissive laws (Fair Trade) and compulsory laws (Unfair Practice), see Miller, *"Unfair Competition"* (1941), pp. 244-245.

[120] 81 Cong. Rec. pp. 7490-7491; 8138-8143.

gestion on the part of any proponent of the measure, or any one else, that the opposition was in error in asserting (as Senator King did) that the legislation would extend to the non-signer aspect of State Fair Trade Acts.

The same comment also applies to the efforts of opposing counsel to capitalize (pp. 52-53, 77, 81) on the absence of specific mention of the non-signer provisions in some of the earlier committee reports.[121] The *non-signer* provisions, in addition to being well *publicized* in the printed communication from the Chairman of the Federal Trade Commission sent to the Senate by the President,[122] were also quoted and specifically mentioned in the House Committee report on H. R. 1611,[123] and were quite extensively used as an opposing argument in the Senate Committee minority report on Title VIII of H. R. 7472.[124]

Opposing counsel also seek to attribute significance (p. 54) to the characterization of this legislative proposal by Senator Tydings as "*not a price-fixing measure*" and to his accompanying assertion that he had "*never voted for a price-fixing bill*".[125] It is obvious that, in making these statements, Senator Tydings had in mind the then recent *characterization* of the Illinois Fair Trade Act by this Court as *not a "price-fixing law"* and hence not open to constitutional objection on that ground.[126] Speaking particularly of the non-signer pro-

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121 S. Rep. No. 2053, 74th Cong., 2d Sess.; S. Rep. No 257, 75th Cong., 1st Sess.

122 S. Doc. No. 58, pp. 2-3, 75th Cong., 1st Sess.

123 H. R. Rep. No. 382, part 1, p. 2, and part 2, p. 24, 75th Cong., 1st Sess.

124 S. Rep. 879, part 2, pp. 4-6, 75th Cong., 1st Sess.

125 81 Cong. Rec. p. 7496.

126 299 U. S. at pp. 191-193.

visions (Section 2), this Court there said:

> " * * * The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and *not as an end in itself.*" [127]

The foregoing analysis demonstrates that the remarks of Senator Tydings which are emphasized by opposing counsel actually reflected his appreciation of the *close relationship* between the Miller-Tydings Amendment and the *non-signer* provisions of State Fair Trade Acts.

We believe that our detailed review of the legislative history of the Miller-Tydings Amendment leaves no room for doubt as to the interpretation to be placed upon the statute. The conclusion necessarily to be reached from a study of the debates and reports has been well summarized in the following statement:

> "The legislative history of the Miller-Tydings Bill fully supports the conclusion that Congress intended to give the states a free hand to enforce their programs and had no intention of retaining the sole jurisdiction over non-contracting dealers who are engaged in interstate commerce. The Federal Bill, sometimes referred to as an enabling act, was passed with full knowledge of the nature and extent of the duty to observe prices imposed by the State Acts and with the very purpose of imposing an analogous duty upon those engaged in interstate commerce. In the hearings before the House Committee and in the

[127] Following the views thus expressed by this Court, the Louisiana Supreme Court definitely classified the Louisiana Fair Trade Act as *"not a price-fixing statute"* in *Pepsodent Co. v. Krauss Co.*, 200 La. 959, 982, (1942), using substantially the language of this Court quoted above.

debates upon the bill in the committee, objection was made to imposing a duty upon non-contracting dealers but the objections were overruled by the committee after full discussion." [127a]

The Government's brief suggests (p. 14) that the language of the Louisiana Act goes beyond the exemption established by the Miller-Tydings Amendment by authorizing maximum prices which might bring the cases within the decision in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). The suggestion cannot be maintained in view of the decision in *Pepsodent Co. v. Krauss Co.*, 200 La. 959, 968 (1942), in which the Court said:

> "* * * * Since the statute precludes sales at prices less than those stipulated in the contract and places no restriction on sales at prices in excess of those stipulated, the statute is *in effect establishing a minimum price.* Our conclusion, therefore is that a contract which provides that the seller will not resell the commodity at less than the minimum retail or resale price complies with the statutory requirements of the Louisiana Fair Trade Act."

This decision has been recognized as a conclusive determination of the Louisiana law. See *Mennen Co. and Bristol-Myers Co. v. Krauss Co.*, 134 F. 2d 348 (C.A. 5, 1943). These circumstances refute the Government's suggestion.

[127a] See Note, 16 New York Univ. L. Quar. Rev. 144 (1938).

The Absence of Express Reference In the Miller-Tydings Amendment to the Non-Signer Provisions In State Acts Is of No Significance. When the Miller-Tydings Amendment Was Enacted, Congress Did Not Intend to Set Up A Federal Code of Fair Trade Practices. The Intent Was to Leave the Subject Matter to the States.

Opposing counsel contend (pages 93-94) that support for their position is to be found by comparing the language of the Miller-Tydings Amendment with the language of the bills introduced in Congress in earlier years, including particularly the Capper-Kelley bill[128] which was first introduced in 1917 and never enacted (although introduced in every session following 1917 to 1933). We believe that the suggested contrast so far from adding to the argument for the petitioners, contributes to its denial.

The Capper-Kelly bill envisaged a system of uniform federal legislation which would in effect have established a federal code of fair trade practice. The Miller-Tydings Amendment, on the other hand, as its language shows, contemplated that State law and not National law should be the guide to the solution of the resale price maintenance problem.[129] The difference in approach[129a] evidenced by the Miller-Tydings Amendment was expressed by Senator Tydings in the language

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[128] As noted by opposing counsel, at the time this bill was drafted State Fair Trade acts had not emerged.

[129] See discussion, *supra*, pp. 7-14.

[129a] This difference in approach was referred to by Senator Barkley when he commented that the proposed legislation was "*quite different* from the provisions which have been contained in similar legislation which has been pending in Congress ever since I have been here" and added "and in my judgment *the change very much improves* the proposed legislation". 81 Cong. Rec. pp. 7495-7496, *supra*, pp. 52-53.

quoted *supra*, pages 51-53, when he said: [130]

> "What we have attempted to do is what 42 States have already written on their statute books. It is simply *to back up those acts*, that is all; to have a code of fair trade practices written *not by a national board* such as the N.R.A. but *by each State* so that the people may go to the State legislature and correct immediately any abuses that may develop. We are trying to *decentralize* fair trade practices * * * ." [130a]

Once the proposed federal regulation ceased to move in the direction of a Federal code which would have embodied a uniform national policy and, instead, took as its objective an enabling act which would authorize each State to apply its local law to transactions within the State which might affect interstate commerce, it became unnecessary for the enabling act to go into any further detail. The policy of decentralization to which Senator Tydings referred contemplated the possibility that State laws might vary among themselves, as in fact they do.[131]

It appears clearly from the foregoing that the Congressional intent in enacting the Miller-Tydings Amendment was *not* to impose a Federal rule of resale price maintenance policies uniformly applicable to the whole

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[130] 81 Cong. Rec. p. 7496.

[130a] It was repeatedly pointed out during the consideration of the bills that were introduced in the 74th and 75th Congresses that the legislation which they proposed was not legislation to put into effect a national policy but rather legislation "which helps the States to put into effect a policy originating within the States themselves" see the remarks of Representative McLaughlin, 81 Cong. Rec. pp. 8140-8143, *supra*, pp. 58-62.

[131] See charts at CCH Trade Regulation Service, Paragraphs ¶ 7011 ff.

In the communication from the Chairman of the Federal Trade Commission which the President transmitted to Congress when it was considering the Miller-Tydings Amendment, and to which Congress declined to defer, special reference was made to the fact that the adoption of the amendment would permit divergent fair trade policies in the various states. See *supra*, pp. 45.

country but, on the contrary, to permit each State to determine its own manner of handling the problem, subject only to the requirement that the commodities be trade-marked and in completition with other commodities of the same class, and that there be no horizontal price fixing. Under such circumstances it would have been inconsistent for Congress to have included a section in the Miller-Tydings Act comparable to Section 2 of the State Fair Trade Acts.

When Congress enacted the Miller-Tydings Amendment, it necessarily understood that having thereby exempted resale price maintenance contracts and agreements under State Fair Trade Acts from the impact of the Sherman Act, it need make no special reference to the non-signer provisions of the State Fair Trade Acts. This was understood because when Congress removed resale price maintenance contracts under State Fair Trade Acts from invalidity under the Sherman Act, the States then possessed full power to deal with all situations arising under their respective Fair Trade Acts, uninhibited by the Commerce Clause. Congress, therefore, effectuated a policy of State control of resale price maintenance by a validation, with respect to interstate commerce, of resale price maintenance contracts or agreements valid under State law, leaving to each State its own determination of the consequences it might deem fit to attach to the contracts or agreements authorized by its own Fair Trade Act. Compare *Parker v. Brown*, *supra* pages 13-14, where a State regulation of interstate commerce was upheld as constitutional—even without the benefit of a Federal act (such as the Miller-Tydings Amendment) indicating that the Sherman Act was not to apply in the field—the Court saying:

> "The state in adopting and enforcing the prorate program made no contract or agreement

and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. * * * " (317 U. S. p. 352).

"Hence we cannot say that the effect of the State program on interstate commerce is one which conflicts with Congressional policy." (317 U. S. p. 368)

This language is applicable *a fortiori* to the present cases, in view of the positive action of Congress in enacting the Miller-Tydings Amendment.

SUMMARY AND CONCLUSION

The District Court and the Court of Appeals were right in holding that the respondents were entitled to the relief sought in these suits. The transactions of the respondents were in accordance with the provisions of the Louisiana Fair Trade Act and the petitioners, having notice of the Fair Trade Contracts, were bound to maintain the resale prices of the trade-marked articles distributed by the respondents. The language of the Miller-Tydings Amendment is on its face sufficient to support the conclusions of the lower courts, but reference to the legislative history of the Act leaves no reasonable doubt as to the correctness of the decisions below. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Section 1 of the Sherman Anti-Trust Act in Original Form and as Amended by Miller-Tydings Amendment

For purposes of ready comparison we set out in parallel columns Section 1 of the Sherman Act in its original language and that Section as amended and re-enacted by the Miller-Tydings Amendment, indicating in the latter by italics the language added by the Amendment (no language was deleted by the Amendment):

Original Enactment

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Amended Re-enactment

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; *Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distriguted by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any*

statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section E, *as amended and supplemented, of the Act entitle 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.* Every person who shall make any such contract or engage in any such combination or conspiracy *hereby declared to be illegal*

shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or both said punishments, in the discretion of the Court."[1a]

[1a] As this amended re-enactment of Section 1 of the Sherman Act now appears in 15 U.S.C. Sec. 1, the references in three places have been rephrased to specify the appropriate U. S. Code sections identified by these references. This editorial rephrasing of course makes no change in the legal meaning and effect of the statute.

APPENDIX B

Louisiana Fair Trade Act.[2a]

Act 13 of 1936

AN ACT

To protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.

Section 1. Be it enacted by the Legislature of Louisiana, That no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Louisiana by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.
2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

[2a] On May 1, 1950, this statute became Sections 391-396 of Title 51 of the Louisiana Revised Statutes of 1950. No change in language of any significance here was made in this revision.

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.
2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.
3. By any officer acting under the orders of any court.

Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 4. The following terms, as used in this Act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

Section 5. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Section 6. This Act may be known and cited as "Fair Trade Act."